No. 92-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

—v.—

OPAL JOHNSON, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF WILLIAM JOHNSON, DECEASED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a state court cannot constitutionally exercise personal jurisdiction over or require the appearance of certain out-of-state employees of a corporate defendant, does the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibit the court from circumventing constitutional limits on its jurisdiction by conscripting the private employer—on pain of substantial sanctions—to compel those specific employees to travel to the state and appear as witnesses in a civil trial?

LIST OF PARTIES AND RULE 29.1 STATEMENT

The petitioner and respondent before this Court were the only parties in the Appellate Court of Illinois.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Owens-Corning Fiberglas Corporation states that it is a publicly held corporation, has no parent company and has no affiliates other than wholly owned subsidiaries.

The plaintiff in the trial court (respondent here) was Opal Johnson, individually and as special administrator for the estate of William Johnson, deceased. The defendants named in the complaint were Owens-Corning Fiberglas Corporation; Brakegate, Ltd.; Charter Consolidated, PLC; Charter Consolidated Services, Ltd.; Central Mining Finance, Ltd.; The Consolidated Mines Selection Company, Ltd.; British South Africa Company; Cape Asbestos Fibres, Ltd.; EGNEP (Pty) Limited; Gatke Corporation; Abex Corporation; H.K. Porter Company, Inc.; and North American Asbestos Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Owens-Corning Fiberglas Corporation ("OCF") respectfully prays that this Court grant a writ of certiorari to review the judgment of the Appellate Court of Illinois, Fourth District, entered in this case on August 27, 1992.

OPINION BELOW

The Appellate Court's opinion is reported at 233 Ill. App. 3d 425, 599 N.E.2d 129, 174 Ill. Dec. 583 (1992), and is reprinted in the appendix at 1a-16a. The order of

the Supreme Court of Illinois denying OCF leave to appeal is noted at 147 Ill. 2d 627 and is reprinted in the appendix at 17a.

The relevant orders and judgment of the trial court, the Circuit Court of McLean County, Illinois, have not been reported. They are reprinted in the appendix at 20a-24a and 27a-36a.

JURISDICTION

The judgment of the Appellate Court of Illinois was entered on August 27, 1992. On December 2, 1992, the Supreme Court of Illinois denied OCF's timely request for leave to appeal. This petition has been filed within 90 days of that ruling. This Court has jurisdiction to review the Appellate Court's judgment under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

This petition involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The petition also involves Illinois Supreme Court Rule 237(b), Ill. Ann. Stat. ch. 110A, para. 237(b) (Smith-Hurd 1985), which provides:

> The appearance at the trial of a party or a person who at the time of trial is an officer, director, or employee of a party may be required by serving the party with a notice designating the person who is required to appear. The notice also may require the production at the trial of documents or tangible things. If the party or person is a nonresident of the county, the court may order any terms and conditions in connection with his appearance at the trial that are just, including payment of his reasonable expenses. Upon a failure to comply with the notice, the court may enter any order that is just, including any order provided for in Rule 219(c) that may be appropriate.

This petition questions the constitutionality of Illinois Supreme Court Rule 237(b) as applied in this case. Because neither the State of Illinois nor any agency, officer or employee of that State is a party, OCF notes that 28 U.S.C. § 2403(b) might be applicable.

STATEMENT OF THE CASE

William Johnson, respondent's ("plaintiff's") decedent, worked from 1951 until 1977 at the Bloomington, Illinois plant of Unarco Industries, Inc., which OCF purchased in April 1970. He died in 1987. In 1989, plaintiff sued OCF in the Circuit Court of McLean County, alleging that OCF had committed a battery against her husband by intentionally causing his death through exposure to asbestos-containing products at the Bloomington plant.

On October 15, 1991, shortly before trial, plaintiff filed a notice under Illinois Supreme Court Rule 237(b), demanding that OCF produce Dr. Jon Konzen and Mr. William W. Boeschenstein as witnesses at trial. Dr. Konzen was then OCF's Vice President for Medical and Health Affairs; Mr. Boeschenstein was and is a member of OCF's board of directors and previously had been OCF's President and Chief Executive Officer. Each of them had his residence and principal place of business in Ohio.[1]

OCF moved to quash the notice on the ground that Rule 237(b) "is unconstitutional . . . in that it is violative of the Constitution of the State of Illinois . . . [and] the United States Constitution, the Fifth Amendment and the Fourteenth Amendment." [5 R. C1917.] It was undisputed that the individuals lacked minimum contacts with Illinois and that the court itself thus could not require them to appear in that State. OCF therefore argued that the Due Process Clause prevented the court from using OCF as a tool to achieve indirectly what the court could not do directly: compel the Ohio residents to surrender their right not to appear in an Illinois court.

Dr. Konzen and Mr. Boeschenstein also filed special and limited appearances and moved for a protective order. Both men submitted affidavits asserting their lack of contacts with Illinois and their unwillingness to travel to that State to testify, but both reaffirmed their previous offers to submit to depositions in Ohio.

On November 1, 1991, the trial court denied OCF's motion to quash [31a] and struck the individuals' special

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[1] In April 1991, plaintiff had asked to depose Dr. Konzen and Mr. Boeschenstein. Both men made themselves available for depositions in Toledo, Ohio, on several different dates, but plaintiff chose not to depose either of them.

and limited appearances and motion for a protective order [29a]. The court acknowledged that it lacked "the authority to compel [the witnesses] to come to the State of Illinois to testify" [27a]—but it nevertheless concluded that due-process principles did not apply because "the coercion, if there is any, . . . is the economic coercion of their employer in desiring to have their testimony in court" [28a]. The court added that "[i]f Owens-Corning does not wish to produce these people, then, of course, it is subject to default." [28a.]

The court denied OCF's motions for leave to file an interlocutory appeal [23a] and for a stay pending disposition of OCF's mandamus petition to the Illinois Supreme Court [24a]. The Illinois Supreme Court later denied OCF's emergency motion for a stay [25a] and OCF's petition for leave to file a complaint for mandamus or a supervisory order [26a].

On November 7, 1991, OCF's counsel told the court that Dr. Konzen and Mr. Boeschenstein would not appear at trial. Plaintiff then moved for sanctions and asked the court to strike OCF's answer, enter a default against OCF on both liability and causation, and proceed to trial only on the issue of damages.

The court again overruled OCF's constitutional objections and granted plaintiff's motion for sanctions. The court struck OCF's answer and ordered a default on all issues except the amount of damages. [36a.]

The case was tried solely on the issue of damages, and the jury returned a $510,000 verdict for plaintiff. The court entered judgment on the verdict. [20a.]

OCF filed timely post-trial motions arguing that Rule 237(b) "can[not] supersede federal due process principles,

which . . . prevent this court from compelling the appearance of these individuals at trial." [5 R. C2210-11.] The court denied the motions on February 4, 1992. [21a-22a.]

OCF appealed to the Appellate Court for the Fourth District and again urged that Rule 237(b), as applied here, was "contrary to fundamental principles of Illinois and federal due process."[2] The court affirmed the judgment on August 27, 1992. [1a-16a.]

The Appellate Court noted that "[t]he trial court recognized it did not have personal jurisdiction over [Dr. Konzen and Mr. Boeschenstein]." [11a.] But it nevertheless held that the trial court's orders did not violate due-process principles because "[u]ltimately, it is the corporate defendant which forces its employees to submit to the jurisdiction of Illinois, not the court." [11a.]

OCF then petitioned for leave to appeal to the Illinois Supreme Court, again raising its federal due-process claims.[3] The Illinois Supreme Court denied OCF's petition on December 2, 1992. [17a.]

REASONS FOR GRANTING THE WRIT

The Illinois Appellate Court improperly approved an approach that permits state courts to circumvent Fourteenth Amendment limitations on their jurisdiction by conscripting employers to coerce the appearance of named individual employees over whom the State itself

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[2] OCF Brief at 15; *see also id.* at 21; OCF Reply Brief at 1-2, 11 (arguing that Rule 237(b) as applied by trial court violated federal due process).

[3] *See* Petition for Leave to Appeal at 11-12, 16 n.5, 22 (arguing that Rule 237(b) as applied by trial court violated federal due process).

cannot constitutionally exercise personal jurisdiction. More generally, the Appellate Court's analysis permits any State to evade constitutional constraints by forcing private parties—on pain of sanctions—to do things that the State itself cannot do directly.

This erroneous and dangerous doctrine subverts constitutional limitations on States' authority and undermines the distinction between public and private action, in conflict with numerous decisions of this Court. The Appellate Court's ruling also presents an important question of federal law that this Court should settle promptly—to prevent other parties from using Illinois Supreme Court Rule 237(b) and any similar rules in other States to harass corporate litigants by threatening to turn their directors, officers and employees into full-time witnesses.

I.

An Employer's Actions Against Its Employees, When Compelled by State Law or Authority, Constitute State Action Subject to the Fourteenth Amendment, and the Illinois Court Therefore Could Not Properly Try to Coerce OCF to Achieve a Result That the Court Could Not Constitutionally Accomplish on Its Own.

It is undisputed in this case that the trial court itself lacked jurisdiction to compel Dr. Konzen and Mr. Boeschenstein to appear as witnesses at trial.[4] The trial

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[4] A court cannot require individuals to give evidence unless it can exercise personal jurisdiction over them. *E.g.*, *Robertson v. Railroad Labor Board*, 268 U.S. 619, 622-27 (1925); *In re Marc Rich & Co.*, 707 F.2d 663, 667 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983); *see In re Sealed Case*, 832 F.2d 1268, 1272-73 (D.C. Cir.

court and the Appellate Court therefore concluded that an Illinois court could not constitutionally subpoena those individuals directly. [11a, 27a-28a.]

But despite this lack of constitutional authority to compel Dr. Konzen's and Mr. Boeschenstein's appearance, the Appellate Court saw no due-process problem in the trial court's sanctioning OCF for failing to force the out-of-state individuals to appear because "[u]ltimately, it is the corporate defendant which forces its employees to submit to the jurisdiction of Illinois, not the court." [11a.] This reasoning ignores the principle that a private employer's (or any other private person's) actions are the State's actions for due-process purposes when they are coerced or required by state authority—and that the Fourteenth

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1987); *Solliday v. District Court*, 135 Colo. 489, 498, 313 P.2d 1000, 1004-05 (1957); *Pasto v. State*, 356 So. 2d 587, 590 (Miss. 1978); *State v. Waits*, 92 N.M. 275, 277, 587 P.2d 53, 55 (Ct. App. 1978); *State ex rel. McKee v. Breidenbach*, 246 Wis. 513, 517-18, 17 N.W.2d 554, 556 (1945).

The Due Process Clause itself precludes a sovereign from exercising personal jurisdiction over a person or entity who does not have at least "minimum contacts" with the forum. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *In re Sealed Case*, 832 F.2d at 1273; *see also Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (state-court jurisdiction must not "offend ' "traditional notions of fair play and substantial justice" ' ") (quoting *International Shoe Co.*, 326 U.S. at 316).

That Dr. Konzen was an employee and Mr. Boeschenstein a director and former officer of a corporation over which the Illinois court did have personal jurisdiction is immaterial. Employees' contacts with the forum "are *not* to be judged according to their employer's activities there." *Calder v. Jones*, 465 U.S. 783, 790 (1984) (emphasis added); *accord Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) ("jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him").

Amendment therefore prohibited the trial court from trying to force OCF to do what the court itself could not constitutionally accomplish.

A. The Fourteenth Amendment Applies to Private Conduct Coerced by the State.

This Court's precedents establish that a State may not avoid constitutional limitations on its own powers merely by having a private party act on its behalf or in its stead. Where the Fourteenth Amendment precludes the State itself from doing something, the State " 'may not [so act] by direct action or through the medium of others who are under State compulsion to do so.' " *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 171 (1970) (emphasis omitted) (quoting *Baldwin v. Morgan*, 287 F.2d 750, 755-56 (5th Cir. 1961)); *accord Peterson v. City of Greenville*, 373 U.S. 244, 247-48 (1963).

In *Truax v. Raich*, 239 U.S. 33 (1915), for example, the Court upheld an injunction against the prosecution of an employer for exceeding a state-imposed limit on the number of noncitizens that private employers could hire. The Court recognized that the State itself could not "deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood." *Id.* at 41. Nor could the State achieve that result by coercing private employers to do so.

Even though the employer in *Truax* had the absolute right under state law to discharge his noncitizen employees at will, any such discharge in this situation would have resulted from state-imposed requirements, not from the employer's own volition. *Id.* at 38. The noncitizen employees had a "manifest interest in the freedom of the employer to exercise his judgment without illegal inter-

ference or compulsion." *Id.* The statute's coercion of that judgment therefore violated the constitutional rights of the noncitizen employees, who could lose their jobs because of state-imposed sanctions against their private employer. *Id.* at 38-39.

The Court employed a similar analysis in *Barrows v. Jackson*, 346 U.S. 249 (1953), in which a party to a racially restrictive covenant brought a damages action against another party who had breached that covenant. Just as the private employer in *Truax* could have fired his noncitizen employees at will, the private covenantor in *Barrows* lawfully could have discriminated against non-Caucasians. The covenant itself was not invalid under the Fourteenth Amendment, and "no one's constitutional rights were violated by the covenantor's voluntary adherence thereto. Such voluntary adherence would constitute individual action only." 346 U.S. at 253.

But just as the State in *Truax* could not itself deny employment to noncitizens or force the private employer to do so on pain of prosecution, so too could it not discriminate against non-Caucasians in *Barrows* or pressure the private covenantor to do so by holding her liable for damages:

> If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages.

346 U.S. at 254.

These cases and others make clear that " 'private conduct abridging individual rights does no violence to the [Fourteenth Amendment] *unless* to some significant extent the State in any of its manifestations has been found to have become involved in it.' " *Peterson v. City of Greenville*, 373 U.S. at 247 (emphasis added; citation omitted) (Fourteenth Amendment violated where blacks were denied service and arrested in private restaurant because of local ordinance requiring racial separation; even though "manager would have acted as he did independently of the existence of the ordinance," convictions "had the effect . . . of enforcing the ordinance," *id.* at 248); *see Robinson v. Florida*, 378 U.S. 153, 156 (1964) (reversing trespass convictions for refusal to leave private restaurant because State had regulation and manual "putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together"); *see also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (private bank's freezing of assets violates Due Process Clause because state court had issued prejudgment writ of garnishment directing bank to act); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (private employer's garnishment of employee's wages violates Due Process Clause because clerk of state court had issued prejudgment garnishment order to employer).

B. The State Court Could Not Constitutionally Punish OCF for Not Doing What the Court Itself Could Not Do.

Because the Fourteenth Amendment applies when a State compels, coerces or otherwise "to some significant extent . . . become[s] involved in" a private actor's conduct, *Peterson*, 373 U.S. at 247, the trial court's attempt

to force OCF to require Dr. Konzen and Mr. Boeschenstein to appear at trial constituted state action for due-process purposes.

It is no answer to say that OCF could have ordered its employees or directors to travel to Illinois to testify. [28a, 30a.] Nor is it an answer to say that OCF made the "choice" to suffer a default rather than to command the two individuals to appear. [28a, 33a-34a.]

Where the State subjects OCF to a default judgment with substantial liability for failing to make the "choice" that plaintiff and the trial court wanted it to make (but could not have compelled through subpoena power), that "choice" is just as coerced and illusory as was the private employer's "choice" in *Truax* or the private covenantor's "choice" in *Barrows*. The decision "becomes not [OCF's] voluntary choice but the State's choice" that OCF compel the witnesses' attendance "or suffer damages." *Barrows*, 346 U.S. at 254. State action therefore is present, and the Fourteenth Amendment constrains the court's conduct.[5]

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[5] The State's involvement here easily meets this Court's two-part test for determining whether a private actor's conduct constitutes state action. *See Georgia v. McCollum*, 112 S. Ct. 2348, 2354-55 (1992); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2082-83 (1991); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

First, both the demand that the individuals testify and the sanctions imposed on OCF arose from Illinois Supreme Court Rule 237(b), as invoked by plaintiff and enforced by the Illinois courts, and therefore "resulted from the exercise of a right or privilege having its source in state authority." *McCollum*, 112 S. Ct. at 2354; *Edmonson*, 111 S. Ct. at 2082-83; *Lugar*, 457 U.S. at 939. Moreover, a court rule requiring the appearance of witnesses at trial—like the peremptory challenges at issue in *McCollum* and *Edmonson*—"ha[s] no significance outside a court of law." *Edmonson*, 111 S. Ct. at 2083.

(*footnote continued*)

The Appellate Court therefore contravened settled constitutional principles in holding that Rule 237(b) raised no due-process problems because "[u]ltimately" it is the private employer, not the State, that "forces its employees to submit to the jurisdiction of Illinois" [11a]. A State cannot do through a private person what the Fourteenth Amendment prohibits it from doing directly. *Adickes*, 398 U.S. at 171; *cf. Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) ("the State cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy' "); *Terry v. Adams*, 345 U.S. 461, 469 (1953) (opinion of Black, J.) (State cannot "circumvent[ ]" Fifteenth Amendment by permitting political association to hold discriminatory primary election).[6]

Second, a private party required to do something under state compulsion "can be described as a state actor," *McCollum*, 112 S. Ct. at 2355; *see Edmonson*, 111 S. Ct. at 2083; *Lugar*, 457 U.S. at 937, 939. *See, e.g., Adickes*, 398 U.S. at 170; *Barrows*, 346 U.S. at 253-54; *Truax*, 239 U.S. at 38-39. "When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it, and, in fact, has removed that decision from the sphere of private choice." *Peterson*, 373 U.S. at 248.

[6] OCF, as the party against which the trial court imposed the sanctions, has standing to raise Dr. Konzen's and Mr. Boeschenstein's due-process rights in defending itself against the State's action. *See, e.g., Planned Parenthood v. Danforth*, 428 U.S. at 62 (physicians potentially subject to criminal prosecution under statute restricting abortion have standing to raise their patients' constitutional rights); *Barrows*, 346 U.S. at 255-60 (covenantor can assert equal-protection rights of non-Caucasians where covenantor herself has been sued for damages).

II.

This Court's Review Is Necessary to Resolve This Important Constitutional Issue and to Prevent Rampant Litigation Abuse Threatening Recurrent Deprivations of Constitutional Rights.

The Illinois Appellate Court's constitutionally infirm ruling that an employer's judicially mandated coercion of its employees is not state action for due-process purposes has potentially far-reaching implications. For example, its reasoning would permit a State to sanction a private employer for refusing to require specified out-of-state employees, under threat of termination, to submit to state-court jurisdiction not only as witnesses but also as defendants—thereby circumventing the Fourteenth Amendment's prohibition against state-court exercise of jurisdiction over individual employees who themselves lack minimum contacts with the State, *see Calder v. Jones*, 465 U.S. at 790; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. at 781 n.13. A State also could coerce an employer to order individual employees (in their personal capacity) to waive their Fifth Amendment rights against self-incrimination, or to do any number of other things that the State itself could not require.

Moreover, the constitutionality of state-court rules requiring employers to produce their employees and directors as witnesses is an important question that frequently recurs at the trial-court level. In fact, it already has arisen in several other cases against OCF in Illinois and elsewhere, and OCF has suffered a number of other defaults for refusing to force specified officers, directors or employees to appear in forums that could not constitutionally exercise personal jurisdiction over them.

In one such case alone, where the plaintiffs demanded the appearances of OCF's Chairman and Chief Executive Officer and its Chief Financial Officer (among others), the court entered a default judgment affecting OCF's liability for compensatory and punitive damages. That default cost OCF more than $10.5 million (including $7.5 million in punitive damages). *Pickering v. Owens-Corning Fiberglas Corp.*, Nos. 90-L-1546, 91-L-621 to -623 (Ill. Cir. Ct., 3d Jud. Cir., Madison County, April 13, 1992) (appeal pending).[7]

A state provision like Rule 237(b) can be a powerful weapon of harassment against corporate litigants such as OCF, which at the time of trial was defending against some 3,400 claims in Illinois alone—and more than 80,000 asbestos personal-injury claims nationwide. If any and every plaintiff, simply by filing a notice under a state rule, could require a corporate party anywhere in the world to drag its top officers, directors and employees into any state court in the nation, no company would be able to function. Its officers, directors and employees virtually would become full-time witnesses, spending their time in airplanes, lawyers' offices and courtrooms, rather than at their jobs.[8]

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[7] Illinois trial courts have entered defaults against OCF under Rule 237(b) in at least six other cases: *Hammond v. OCF*, No. 87-L-246 (Ill. Cir. Ct., 11th Jud. Cir., McLean County); *Smith v. OCF*, No. 87-L-293 (Ill. Cir. Ct., 11th Jud. Cir., McLean County); *Adcock v. OCF*, No. 87-L-306 (Ill. Cir. Ct. 11th Jud. Cir., McLean County); *Gerzsenye v. OCF*, No. 89-L-269 (Ill. Cir. Ct., 11th Jud. Cir., McLean County); *Costa v. OCF*, No. 88-L-239 (Ill. Cir. Ct., 10th Jud. Cir., Peoria County); *Kearney v. OCF*, No. 89-L-1153 (Ill. Cir. Ct., 6th Jud. Cir., Champaign County).

[8] That the real agenda behind plaintiff's Rule 237(b) notice was to harass or pressure OCF, rather than to obtain needed testimony, is evident from the fact that plaintiff chose not to depose Dr.

OCF believes that the constitutional issue in this case regularly arises in actions against other defendants as well but tends to evade review. Both the magnitude of the possible sanctions for refusing to compel out-of-state employees to appear and the unavailability of an appeal as of right until after entry of final judgment can strongly discourage a party defending a single action from taking the position that OCF took below. *See Bluestein v. Upjohn Co.*, 102 Ill. App. 3d 672, 678-79, 430 N.E.2d 580, 585 (1981) (after Illinois Supreme Court denied mandamus petition, defendant produced witness). A "repeat" litigant such as OCF, however, which has been sued by tens of thousands of asbestos plaintiffs, cannot afford to acquiesce every time a plaintiff demands that it bring specified officers, employees and directors to a foreign State.

The federal District Courts have capably administered justice for decades without being able to compel the attendance of parties' employees and directors—or even of parties themselves—residing beyond their subpoena power as limited by Fed. R. Civ. P. 45(b)(2). Federal courts regularly have rejected the argument that they possess inherent authority to compel a party—or an officer, director or employee of a corporate party—to appear at trial when he or she is outside the court's subpoena power. *E.g.*, *McGill v. Duckworth*, 944 F.2d 344, 354 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1265 (1992); *GFI Computer Indus., Inc. v. Fry*, 476 F.2d 1, 5 (5th Cir. 1973); *Central Grain & Stock Exch. v. Board of Trade*, 125 F. 463, 467-68 (7th

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Konzen or Mr. Boeschenstein, despite their repeated willingness to make themselves available in Ohio. (The *Pickering* plaintiffs also declined to depose any of the four persons whose trial appearances they demanded.) If plaintiff genuinely believed that these individuals had important information, she and her lawyers surely would have wished to explore it with them *before* they took the witness stand in front of the jury.

Cir. 1903); *In re Air Crash Disaster at Detroit Metro. Airport*, 130 F.R.D. 647, 650 (E.D. Mich. 1989); *Standard Metals Corp. v. Tomlin*, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,644, at 93,176 (S.D.N.Y. 1982); *Steel, Inc. v. Atchison, T. & S.F. Ry. Co.*, 41 F.R.D. 337, 339 (D. Kan. 1967); *see also Czuprynski v. Shenango Furnace Co.*, 2 F.R.D. 412, 412-13 (W.D.N.Y. 1942).

The federal courts' experience demonstrates that constitutional limitations on state courts' authority to compel the attendance of out-of-state witnesses work no unfairness, for "[t]he law furnishes ample machinery to procure the testimony of any witness, . . . if the witness is beyond the jurisdiction of the court, by deposition or upon commission." *Central Grain & Stock Exch. v. Board of Trade*, 125 F. at 467-68. In this case, plaintiff could have deposed Dr. Konzen and Mr. Boeschenstein in Ohio and then introduced at trial all admissible portions of those depositions. Ill. Sup. Ct. R. 202, 206, 212, Ill. Ann. Stat. ch. 110A, paras. 202, 206, 212 (Smith-Hurd 1985 & Supp. 1992). Alternatively, she could have sued in a forum that would have had subpoena power over them.

Extraterritorial application of Illinois Rule 237(b) therefore is not essential for the effective administration of justice. This Court should not countenance its continued, unconstitutional use as a harassment device.

CONCLUSION

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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March 2, 1993

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IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

No. 4-92-0175

(August 27, 1992)

OPAL JOHNSON, Individually and as Special Administrator for the Estate of WILLIAM JOHNSON, deceased,

Plaintiff-Appellee,

—v.—

OWENS-CORNING FIBERGLAS CORPORATION,

Defendant-Appellant,

—and—

BRAKEGATE, LTD., CHARTER CONSOLIDATED, PLC, CHARTER CONSOLIDATED INVESTMENTS, LTD., CHARTER CONSOLIDATED SERVICES, LTD., CENTRAL MINING FINANCE, LTD., THE CONSOLIDATED MINES SELECTION COMPANY, LTD., BRITISH SOUTH AFRICA COMPANY, CAPE ASBESTOS FIBRES, LTD., EGNEP (PTY) LIMITED, GATKE CORPORATION, ABEX CORPORATION, H.K. PORTER COMPANY, INC., and NORTH AMERICAN ASBESTOS CORPORATION,

Defendants.

Appeal from Circuit Court of McLean County
No. 89-L-187
Honorable William T. Caisley, Judge Presiding.

JUSTICE COOK delivered the opinion of the court:

Owens-Corning Fiberglas Corporation (OCF or defendant) appeals the default judgment entered against it for noncompliance with a Supreme Court Rule 237(b) (134 Ill. 2d R. 237(b)) notice, compelling it to produce its medical director and a member of its board of directors as witnesses at trial; the judgment entered against it; and the order denying its motion for post-trial relief. Defendant argues (1) the trial court lacked authority under Rule 237(b) to sanction it for failing to produce witnesses who are not individually subject to Illinois process; (2) the sanctions entered against it exceeded the permissible scope of Supreme Court Rule 219(c) (134 Ill. 2d R. 219(c)); and (3) the trial court erred in giving a negative inference instruction. We affirm.

On September 19, 1989, plaintiff, in her individual capacity and as special administrator of the estate of William Johnson, deceased, filed a 12-count complaint in the circuit court of McLean County against defendant OCF, and other defendants not parties to this appeal, seeking damages for injuries sustained due to the death of decedent. All defendants, except OCF, were dismissed as parties or default judgments were entered against them before trial. Counts V through XII of the complaint were directed at OCF. These counts alleged various theories of recovery including civil conspiracy (counts V and VI), murder (counts VII and X), intentional or fraudulent misrepresentation (counts VIII and XI), and battery (counts IX and XII). All counts, except count IX, were dismissed before trial.

Decedent was employed from 1951 to 1977 at the Bloomington, Illinois, plant of Unarco Industries, Inc., which OCF purchased in April 1970. Decedent died on November 27, 1987. The death certificate indicated the

cause of death was "chronic respiratory insufficiency," "restrictive lung disease," and "pulmonary asbestosis." Decedent also suffered from "chronic renal failure," a condition cited as contributing to his death but not related to the cause of death. An autopsy performed on decedent after the death certificate was signed disclosed decedent also had lung cancer.

The remaining count against defendant alleged that it committed a battery against decedent by intentionally causing his death by exposing him to asbestos. Plaintiff claimed decedent was exposed to asbestos while he worked at the plant and, as a result of his exposure, contracted asbestosis and lung cancer. She further averred that defendant knew exposure to asbestos caused asbestosis and malignancies, and it knew decedent would be exposed to asbestos and would die as a result. She also stated defendant's purpose was to operate the plant using asbestos and asbestos products, and in doing so, defendant intended to cause great bodily harm to decedent. She contended defendant's intentional conduct was the proximate cause of decedent's death.

On October 15, 1991, plaintiff filed a request, pursuant to Rule 237(b) (134 Ill. 2d R. 237(b)), that defendant produce Dr. Jon Konzen, medical director of defendant; W.W. Boeschenstein, former chairman and chief executive officer of defendant and a current member of its board of directors; and various documents at trial. In response, Konzen and Boeschenstein filed a special and limited appearance and a motion for a protective order, contesting the court's authority to assert personal jurisdiction over them and compel them to travel to Illinois to testify. Defendant concurrently filed a motion to quash plaintiff's Rule 237(b) request insofar as it related to the production of Konzen and Boeschenstein at trial. It argued that plaintiff could not demonstrate good cause sufficient to justify

the compelled appearance of these individuals, and the court lacked authority under the Illinois long-arm statute to compel them to appear. Defendant further argued that Rule 237(b) was unconstitutional on its face and as applied to Konzen and Boeschenstein because it violated due process in that it sought to compel the attendance of nonparty witnesses not subject to the jurisdiction of Illinois.

In response, plaintiff filed a motion to strike the special and limited appearance and motion for a protective order. The court subsequently struck the special and limited appearance and ordered defendant to produce the witnesses. The court agreed that it did not have the authority to compel them to come to Illinois to testify but that any "coercion" upon them to appear was the "economic coercion of [defendant]" and the desire to have their testimony heard in court. It further agreed due process applied to Rule 237(b), but determined no violation of due process occurred because the request was directed at defendant, over which the court had jurisdiction. The court also denied defendant's motion to quash.

In light of these rulings, defendant sought leave to file an interlocutory appeal pursuant to Supreme Court Rule 308 (134 Ill. 2d R. 308), which the circuit court denied. The defendant then moved to stay the proceedings pending the filing of a petition for leave to file a complaint for writ of *mandamus* for a supervisory order in the Illinois Supreme Court. The circuit court also denied this motion. On November 4, 1991, defendant filed with the Illinois Supreme Court a motion for leave to file a complaint for an order of *mandamus* or prohibition, or in the alternative, for a supervisory order and an emergency motion for stay of proceedings pending disposition of defendant's motion. The supreme court denied defendant's emergency motion on November 5, 1991. (*Konzen v. Caisley* (Nov. 5, 1991,

No. 72780) (Clerk's order).) The supreme court denied defendant's other motion on December 11, 1991. *Owens-Corning Fiberglas Corp. v. Caisley* (Dec. 11, 1991), Docket No. 72788 (Clerk's order).

At the pretrial hearing on November 7, 1991, defendant moved the circuit court to stay the trial pending a hearing upon its petitions in the supreme court. The court denied the motion. Defense counsel then advised the court that Konzen and Boeschenstein would not be appearing. Plaintiff moved to strike defendant's pleading and for entry of default judgment as a sanction for noncompliance with the Rule 237(b) notice, leaving only the issue of damages for the jury to determine. In support plaintiff stated that if Konzen were there he would testify, *inter alia*, that (1) he became medical director of defendant in 1968; (2) he was asked to evaluate the Bloomington plant before defendant purchased it regarding asbestos; (3) he made an investigation of the plant after it was purchased and from the inspection determined that the amount of airborne asbestos in the plant was unacceptable; (4) he hired an industrial engineer to study the plant, and the study stated that " '[t]his plant [was] grossly deficient. The industrial hygiene is totally inadequate. The airborne asbestos levels are excessive and certain to cause disease' "; (5) he made numerous trips to the plant until 1972, when asbestos was no longer used as an ingredient in the plant's processes; (6) he knew asbestos levels in the plant would cause disease and that the workers did not know that the level of asbestos to which they were exposed would cause disease; (7) he evaluated the health of decedent, and the evaluation showed decedent had asbestosis; (8) he knew no one told decedent that defendant knew he had asbestosis; and (9) the asbestos to which defendant exposed decedent caused decedent's lung cancer.

Plaintiff further asserted that Boeschenstein would testify as follows: (1) as of 1970, he was senior vice-president of defendant; (2) he had knowledge defendant used asbestos in its products, and these products caused disease in the plant and in people using them; (3) Konzen told him the condition at the plant was certain to cause disease, but defendant decided to continue to operate the plant in the same manner, knowing the workers did not know the risk to which they were exposed; and (4) he was involved in evaluating the recommendations Konzen made for further improvements at the plant, but these improvements were not made and the level of airborne asbestos was even in excess of those which the government and defendant knew would cause lung cancer.

Defendant denied that either person would make these statements. It argued that plaintiff had no basis to link Konzen to causation issues and suggested that if the court were going to issue a sanction the sanction be limited to the issue of its liability. The court ordered defendant's answer stricken, that a default judgment be entered, and that the case be tried only on the issue of damages. In so ruling, the court determined that it was due to the willfulness of defendant that Konzen and Boeschenstein did not appear, and, therefore, it was not unreasonable for the court to enter the sanctions that it did.

On November 12, 1991, plaintiff moved to bar defendant's expert witness, Harry Demopolous, from testifying. Plaintiff contended that the only disclosed opinion Demopolous held was that "[decedent] did not die from a disease which can be reasonably related to any alleged exposure to asbestos while employed by [defendant]." Plaintiff maintained this opinion was irrelevant to any issue before the jury, since it was no longer disputed that defendant was liable for the death of decedent. Plaintiff also argued that she was being deprived of the chance to

demonstrate through Konzen's testimony that decedent would have lived for a long time. Defendant argued Demopolous' testimony was relevant not to the issue of causation, but to decedent's life expectancy for the purpose of determining damages.

Plaintiff also filed a motion *in limine* asking that the court preclude defendant from communicating to the jury that someone or something other than the wrongful conduct of the defendant was the cause of death of decedent and from communicating any measure of the effect of the asbestos or any other condition upon decedent's health or life expectancy. The court allowed the motion *in limine* and also allowed plaintiff's motion to exclude the testimony of Demopolous in part. The court held that Demopolous was permitted to testify only to diseases—other than those of the lung—which would reduce decedent's life expectancy.

The trial proceeded on the issue of damages, and Dr. Harry Demopolous testified regarding the extent to which decedent's renal failure may have reduced his life expectancy. To rebut this testimony, plaintiff wished to call Konzen. Outside the presence of the jury, plaintiff called Konzen as a rebuttal witness, and defendant responded that he would not be available. In order to provide a basis for her argument that a negative inference could be drawn from Konzen's refusal to appear, plaintiff requested that defendant stipulate to several things. Defendant agreed to stipulate that Konzen was the medical director of defendant but refused to stipulate that he had any information regarding the issue of damages. Since defendant refused to stipulate to all that plaintiff wanted, she stated she would make an offer of proof to lay a foundation for the court to give a negative inference instruction and for the jury to draw certain inferences. Plaintiff also requested the court to strike Demopolous'

testimony since defendant precluded her from rebutting it with Konzen's. The court denied the request.

When the trial resumed the following day, plaintiff again requested that defendant produce Konzen so she could make her offer of proof in "question and answer form." Defendant replied that it was not going to produce Konzen and that plaintiff had failed to demonstrate Konzen had any knowledge relating to decedent's renal failure or his life expectancy. Plaintiff then made the following offer of proof, stating that Konzen would testify as follows: (1) he became the corporate medical director of OCF in 1968; (2) he became involved in a program of providing annual physical examinations for the employees at the Bloomington plant; (3) decedent's first examination as defendant's employee took place in 1970 by Dr. McNeely, and the reports of this examination were given to him; (4) McNeely and he determined that a further examination should be made of decedent, and those results were reported to him; (5) he was required to analyze the results of these annual physicals, and he did analyze and evaluate the results of decedent's physicals administered from 1970 through 1977; (6) he analyzed and evaluated the health of decedent as a part of his job; (7) he made evaluations of legal claims against defendant, including claims arising out of asbestosis, and has made such an evaluation of this case; (8) decedent sustained lung cancer as a result of his exposure to asbestos during the time he worked for defendant; (9) his lung cancer was the cause of his death and his renal failure; (10) he is familiar with the treatment of renal failure and that individuals such as decedent, who responded well to dialysis, could be expected to live a long time when treatment is continued; and (11) the reason decedent died when he did was that his body was "overburdened by, among other

things, the lung cancer and the effect that [it] had on the entirety of his body, including his renal disorder."

Defendant objected to the offer of proof; the court ordered it received and recorded as part of the evidence in the case, but sustained the objection, and ordered that it not be submitted to the jury. In light of the court's ruling, plaintiff requested that the court reconsider its ruling refusing to strike Demopolous' testimony. The court again declined to strike this testimony.

Therefore the only evidence plaintiff presented in rebuttal was a stipulation which the court read to the jury and was included as plaintiff's instruction No. 9. It stated: "Dr. Jon Konzen is currently the corporate medical director of [defendant]. He is in good health, and he is capable of traveling to Bloomington, Illinois[,] to testify. Defendant has refused to produce Dr. Konzen to testify in this case." No evidence was submitted in surrebuttal, and the instruction conference resumed. At the instruction conference, the court, over the objection of defendant, granted plaintiff's request that a "negative inference" instruction be given to the jury relating to the absence of Konzen.

The jury subsequently returned a verdict for plaintiff in the amount of $510,000, and the court entered judgment on the verdict against defendant OCF, and against defendants Brakegate, Ltd.; Cape Industries, PLC; Cape Asbestos Fiber, Ltd.; and EGNEP (Pty) Ltd. On December 23, 1991, defendant filed a post-trial motion for a judgment *n.o.v.*, or in the alternative, for a new trial or a remittitur. On February 4, 1992, the court ruled that Rule 237(b) was not unconstitutional and did not violate the due process clause of the U.S. and Illinois Constitutions, nor was it unconstitutional as applied to defendant. The court further determined that the sanctions imposed were the only

effective remedy for its noncompliance. Accordingly, the post-trial motion was denied. This appeal followed.

We first consider whether, in light of due process principles, the trial court lacked authority under Rule 237(b) to sanction a defendant for failure to produce witnesses not individually subject to Illinois process.

Rule 237(b) provides:

> "The appearance at the trial of a party or a person who at the time of trial is an officer, director, or employee of a party may be required by serving the party with a notice designating the person who is required to appear. The notice also may require the production at the trial of documents or tangible things. If the party or person is a nonresident of the county, the court may order any terms and conditions in connection with his appearance at the trial that are just, including payment of his reasonable expenses. Upon a failure to comply with the notice, the court may enter any order that is just, including any order provided for in Rule 219(c) that may be appropriate." 134 Ill. 2d R. 237(b).

Defendant initially contends that this rule must be read to comport with principles of due process, and it is a violation of those principles to sanction a defendant for its failure to produce witnesses not subject to the personal jurisdiction of the court. Defendant argues that under *Rollins v. Ellwood* (1990), 141 Ill. 2d 244, 565 N.E.2d 1302, the supreme court recognized the "fiduciary shield doctrine" and thereby established that a court could not obtain jurisdiction over an individual on the basis of the individual's status as an employee of a defendant. Defendant further contends that *Salvator v. Admiral Merchant's Motor Freight* (1988), 175 Ill. App. 3d 901, 530 N.E.2d 639, established that a court cannot compel an

individual, who was not himself subject to the jurisdiction of a court, to appear as a witness because the court has jurisdiction over his employer. Based on these rulings, defendant maintains that since an individual's status as an employee of a defendant cannot be relied on to compel the individual to appear as a witness, it follows that an individual's employer may not be sanctioned for the individual's failure to appear.

In the pending case, the record illustrates that Konzen and Boeschenstein were residents of Ohio; their principal place of business was in Ohio; and they had no personal contacts with Illinois, did not own property in the State or conduct business here, nor did they appear to have otherwise invoked the benefits and protections of Illinois law. The only association they had with Illinois was within the scope of their employment. The trial court recognized it did not have personal jurisdiction over them. However, this fact is of no avail to defendant. The order in this case was directed to the corporate defendant over which the trial court did have jurisdiction, not Konzen and Boeschenstein personally. This factor distinguishes *Salvator*, in which the order was specifically directed at the employee rather than the corporate defendant.

As long as the order is directed at the corporate defendant rather than the individual employees and directors, principles of due process are not violated, and a court may sanction a corporate defendant for its failure to produce its employees. Ultimately, it is the corporate defendant which forces its employees to submit to the jurisdiction of Illinois, not the court. A court has broad authority over a party for the effective administration of justice, and that authority includes the power to compel a party to produce its employees, officers, and directors at trial. While we realize Rule 237(b) may be subject to abuse, its application is under the control of the trial court and the rule is

appropriately employed where, as in this case, there was sufficient evidence to establish its use was intended to elicit probative testimony rather than for harassment. Plaintiff showed good cause. *Oakview New Lenox School District No. 122 v. Ford Motor Co.* (1978), 61 Ill. App. 3d 194, 199, 378 N.E.2d 544, 547-48.

We next consider whether the sanctions entered against defendant for failing to produce the witnesses exceeded the permissible scope of Supreme Court Rule 219(c) (134 Ill. 2d R. 219(c)). Upon the failure to comply with a Rule 237(b) notice, a court "may enter any order that is just, including any order provided for in Rule 219(c) that may be appropriate." (134 Ill. 2d R. 237(b).) In the present case, the court ordered defendant's pleadings stricken and entered default judgment. On the issue of damages, the court restricted defendant to producing evidence relating to health conditions of the defendant, other than those of the lungs, which may have reduced his life expectancy. On appeal, defendant argues the trial court erred in defaulting it on issues relating to causation and damages because it went beyond the scope of the issues to which Konzen and Boeschenstein could have testified.

The imposition of sanctions under Rule 219(c) is a matter within the discretion of the trial court, and a reviewing court will uphold the trial court's decision, absent an abuse of discretion. (*Wegman v. Pratt* (1991), 219 Ill. App. 3d 883, 891, 579 N.E.2d 1035, 1041; *Palmer v. Minor* (1991), 211 Ill. App. 3d 1083, 1086, 570 N.E.2d 774, 776.) Pleadings may be stricken "only when the stricken pleadings bear some reasonable relationship to the information withheld." (*People ex rel. General Motors Corp. v. Bua* (1967), 37 Ill. 2d 180, 197, 226 N.E.2d 6, 16.) The striking of an answer, thereby causing a default, is the most severe sanction a court can impose on a recalcitrant defendant, and such sanction is proper only in

those cases where the actions of a party show deliberate, contumacious or unwarranted disregard of a court's authority. *Barnes v. Black & Decker Manufacturing Co.* (1984), 135 Ill. App. 3d 700, 706, 481 N.E.2d 1200, 1204.

A review of the record reveals that defendant had ample opportunity to comply with plaintiff's Rule 237(b) request but failed to do so. The court found this failure to produce the witnesses was willful and, accordingly, entered sanctions. The trial court did not abuse its discretion in entering sanctions. Although plaintiff did not depose Konzen and Boeschenstein, there was sufficient evidence in the record of the information plaintiff expected to elicit to support a finding that Konzen and Boeschenstein would have relevant information on these issues. (*Soto v. E.W. Bliss Division of Gulf & Western Manufacturing Co.* (1983), 116 Ill. App. 3d 880, 889, 452 N.E.2d 572, 579; *Oakview*, 61 Ill. App. 3d at 199, 378 N.E.2d at 547-48.) Although defendant asserted that Konzen and Boeschenstein did not possess any relevant information on the issue of causation, the record contains numerous documents to or from Konzen and Boeschenstein relating to potential health hazards of the plant's operations; the health status of production employees; asbestos levels and exposure at the plant; and current and future medical programs and activities, including instituting a respiratory program, arranging to have chest X rays monitored by outside consultants, conducting medical evaluations of selected employees' pulmonary status, and having individuals identified as having or possibly having asbestosis consult a chest specialist. This was sufficient information for the trial court to conclude that Konzen and Boeschenstein could have relevant information relating to this issue. Neither plaintiff nor the trial court was required to accept defendant's denials that Konzen and Boeschenstein knew anything.

Further, the trial court did not err in limiting defendant's evidence on the issue of damages. Defendant alleges that decedent left its employ 10 years before he died, and, therefore, Konzen would not have any information or personal knowledge regarding the impact of asbestosis on decedent's life expectancy. The record illustrates, however, that Konzen was involved with assessing the inplant environmental hazards and their effect on the employees, reviewing the medical conditions and examinations of employees relating to their exposure to asbestos, and establishing a medical procedure for examinations of employees suspected of having asbestosis. This evidence supports a finding that Konzen's testimony could relate to the issue of damages so that the court's holding limiting defendant's evidence on this issue was not an abuse of discretion.

Finally, we address whether the trial court erred in giving a negative inference instruction to the jury. Plaintiff's tendered jury instruction No. 7 was based on the Illinois Pattern Jury Instructions, Civil, No. 5.01 (Illinois Pattern Jury Instructions, Civil, No. 5.01 (3d ed. 1992) (hereinafter IPI Civil 3d)). Plaintiff offered this instruction because he was unable to rebut Demopolous' testimony with Konzen's. Defendant argues the trial court erred in giving this instruction because Konzen could not offer any relevant information on the impact of decedent's renal failure on his life expectancy. This contention is also without merit.

IPI Civil 3d No. 5.01 instructs that where a party fails to produce a witness within its power to produce, the jury may infer that the testimony of the witness would be adverse to that party. The adverse inference is available when (1) the witness was under the control of the party to be charged and could have been produced by reasonable

diligence, (2) the witness was not equally available to the adverse party, (3) a reasonably prudent person under the same or similar circumstances would have produced the witness if he believed the testimony would be favorable to him, and (4) no reasonable excuse for the failure to produce the witness has been shown. (*Lewis v. Cotton Belt Route-St. Louis Southwestern Ry. Co.* (1991), 217 Ill. App. 3d 94, 108-09, 576 N.E.2d 918, 930.) The court allowed the instruction by reasoning that Konzen was under defendant's legal control and not equally available to plaintiff.

The giving of IPI Civil 3d No. 5.01 is within the sound discretion of the trial court, and a court of review should reverse only when a clear abuse of discretion appears from the record. (*Betts v. Manville Personal Injury Settlement Trust* (1992), 225 Ill. App. 3d 882, 901, 588 N.E.2d 1193, 1205; *Thompson v. Abbott Laboratories* (1990), 193 Ill. App. 3d 188, 201-02, 549 N.E.2d 1295, 1304; *Tonarelli v. Gibbons* (1984), 121 Ill. App. 3d 1042, 1046-47, 460 N.E.2d 464, 468.) Before giving the instruction, the trial court must first determine whether, in all likelihood, the party would have produced the witness under the facts and circumstances of the case unless the testimony would be unfavorable. (*Thompson*, 193 Ill. App. 3d at 202, 549 N.E.2d at 1304; *Tonarelli*, 121 Ill. App. 3d at 1047, 460 N.E.2d at 468.) Where a witness who has knowledge of the facts and is accessible to a party is not called by a party, a presumption arises that his testimony would be adverse to that party and an instruction could or should be given to that effect upon request. (*Tonarelli*, 121 Ill. App. 3d at 1047, 460 N.E.2d at 468.) The instruction is not warranted, however, when the unproduced witness' testimony would be merely cumulative. *Chuhak v. Chicago Transit Authority* (1987), 152

Ill. App. 3d 480, 489, 504 N.E.2d 875, 881; *Thompson*, 193 Ill. App. 3d at 202, 549 N.E.2d at 1304.

Assuming *arguendo* an error occurred, an error in instructing the jury must have resulted in prejudice to the appealing party for a reversal to be warranted. (*Brazier v. Kontos* (1987), 160 Ill. App. 3d 177, 184, 513 N.E.2d 152, 157; *Villc v. Crown Cork & Seal Co.* (1990), 202 Ill. App. 3d 1082, 1088, 560 N.E.2d 969, 973; *Kohutko v. Four Columns, Ltd.* (1986), 148 Ill. App. 3d 181, 188-89, 498 N.E.2d 522, 527.) Defendant merely asserts in its brief that "prejudicial error" occurred; it provides no discussion. It is unclear from the record whether the jury in fact found these four factors existed warranting a negative inference to be drawn from the fact that defendant failed to produce Konzen, or took this into consideration when determining damages. Even if the trial court abused its discretion in giving the instruction, no prejudice has been shown. Consequently, any alleged error in instructing the jury does not warrant reversal.

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

STEIGMANN and MCCULLOUGH, JJ., concur.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK

. . .

December 2, 1992

. . .

No. 74373—Opal Johnson, Indv., etc., respondent, v. Owens-Corning Fiberglas Corporation, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 24, 1992.

IN THE SUPREME COURT OF ILLINOIS

No.: 74373

OPAL JOHNSON, Individually and as Special Administrator for the Estate of WILLIAM JOHNSON,

Plaintiff-Respondent,

—v.—

OWENS-CORNING FIBERGLAS CORP.,

Defendant-Petitioner,

—and—

BRAKEGATE, LTD., et al.,

Defendants.

APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

No. 4-92-0175

There Heard on Appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois

No. 89 L 187

The Honorable William T. Caisley

ORDER

This matter has come for consideration upon the motion of Petitioner to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

Ben K. Miller
Chief Justice

FILED
DEC 28 1992
SUPREME COURT CLERK

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT
COUNTY OF MCLEAN

No. 89 L 187

OPAL JOHNSON, Individually and as Special Administrator for the Estate of WILLIAM JOHNSON, deceased,

Plaintiff,

—v.—

OWENS-CORNING FIBERGLAS CORP., et al.,

Defendants.

JUDGMENT ORDER

Judgment is entered upon the verdict of the jury for Opal Johnson, Administrator of the Estate of William Johnson, deceased, and against Brakegate, Ltd.; Cape Industries, PLC; Cape Asbestos Fibres, Ltd.; EGNEP (Pty) Limited; and Owens-Corning Fiberglas Corporation, jointly and severally, in the sum of $510,000.00 plus costs.

/s/ William T. Caisley
Circuit Judge

November 13, 1991

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT
COUNTY OF MCLEAN

No. 89 L 187

OPAL JOHNSON, Individually and as Special Administrator for the Estate of WILLIAM JOHNSON, deceased,

Plaintiff,

—vs.—

OWENS-CORNING FIBERGLAS CORP., et al.,

Defendants.

ORDER

This cause has come on for hearing upon the post-trial motion of the defendant, Owens-Corning Fiberglas Corporation for judgment notwithstanding the verdict or for a new trial. The parties waived oral argument on the motion and submitted the issues raised thereby to the court for ruling after consideration of the briefs filed by the parties.

The court found that Supreme Court Rule 237(b) is not unconstitutional in violation of the due process clause of the constitution of the United States and the constitution of the State of Illinois; that it is not unconstitutional as applied to this defendant and its director, W. W. Boeschenstein and its employee, Dr. Jon Konzen.

The court further found that striking the pleadings of the defendant, Owens-Corning Fiberglas Corporation, and entering a default pursuant to Supreme Court Rule 219(c) is the only effective sanction which the court could apply in response to the defendant, Owens-Corning Fiberglas Corporation['s] refusal to comply with Supreme Court Rule 237(b). The post-trial motion is accordingly denied.

ENTERED this 28th day of January, 1992.

/s/ William T. Caisley
Circuit Judge

FILED
FEB 04 1992
MCLEAN COUNTY
CIRCUIT CLERK

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT
COUNTY OF MCLEAN
No. 89 L 187

OPAL JOHNSON, Individually and as Special Administrator for the Estate of WILLIAM JOHNSON, deceased,

Plaintiff,

—VS.—

OWENS-CORNING FIBERGLAS CORP., et al.,

Defendants.

ORDER

This cause having come on before the court this date on motion of the defendant, OWENS-CORNING FIBERGLAS CORPORATION, by its attorneys, BAKER & MARTIER, for the entry of an interlocutory order pursuant to Supreme Court Rule 308(a) (Ill. Rev. Stat. ch. 110A, Sec. 308(a)), and the court being fully advised in the premises;

IT IS HEREBY ORDERED that said motion is denied.

/s/ William T. Caisley
Circuit Judge

November 1, 1991

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT
COUNTY OF MCLEAN

No. 89 L 187

JOHNSON,

Plaintiff,

—v.—

OWENS-CORNING, et al.,

Defendants.

ORDER

This cause coming on to be heard this date on motion for stay of proceedings, of OCF, by its attorneys, Baker & Martier, & the court being fully advised;

It is hereby ordered that said motion is denied;

It is hereby further ordered that should the Illinois Supreme Court grant OCF's motion for leave to file a complaint for an order of mandamus, OCF has leave to renew its motion for stay;

It is hereby further ordered that, pursuant to plaintiff's oral motion, OCF shall produce the May, 1990 deposition [of] Dr. J. Konzen instanter.

/s/ William T. Caisley
Circuit Judge

November 1, 1991

STATE OF ILLINOIS
SUPREME COURT CLERK

. . .

November 5, 1991

. . .

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 72780—Jon Konzen, etc., et al., petitioners v. Hon. William T. Caisley, Judge of the Circuit Court of McLean County, et al., etc., respondents.

The motion by petitioners for stay of proceedings in the Circuit Court of McLean County in *Johnson v. Owens Corning Fiberglas*, case No. 89 L 187 pending disposition of petitioners' motion for mandamus/prohibition or supervisory order is *denied*.

STATE OF ILLINOIS
SUPREME COURT CLERK

. . .

December 11, 1991

. . .

In re: Owens-Corning Fiberglas Corporation, petitioner, v. Hon. William Caisley, etc., et al., respondents. No. 72788

. . .

The Court has today entered the following order in the above entitled cause:

The motion by petitioner for leave to file a petition for an original writ of mandamus or prohibition or for a supervisory order is *denied*.

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT
COUNTY OF MCLEAN

No. 89 L 187

OPAL JOHNSON, as Administrator for the
Estate of William Johnson,

Plaintiff,

—vs.—

BRAKEGATE, et al.,

Defendants.

HEARING ON MOTIONS

[Excerpts containing rulings of court striking special and limited appearances and denying motion to quash Rule 237(b) notice.]

REPORT OF PROCEEDINGS of the hearing before the Honorable WILLIAM T. CAISLEY, on the 1st day of November, 1991.

. . . .

THE COURT: All right. I agree that the Court does not have the authority to compel them [*i.e.*, Dr. Konzen and Mr. Boeschenstein] to come to the State of Illinois to testify, and they are not. I agree with the Plaintiffs, that they are not parties, and, and they are not subject to special

limited appearance procedure under our Code of Civil Procedure, and so I am going to order that the special and limited appearance be stricken because they are not parties, and they have no right to appear here, and the coercion, if there is any, upon your client is the economic coercion of their employer in desiring to have their testimony in court. So that, it is sheerly a matter of economic coercion. If your employees do not wish to come, then they don't have to come. If they don't come, then probably Owens-Corning Fiberglas is going to suffer a default, and there will be a judgment entered here.

If that is done, then Owens-Corning may terminate the employment of your clients, but that is not something that the Court's going to do. It is then solely Owens-Corning's decision as to whether they are going to terminate your clients' employment contracts.

. . . .

THE COURT: I certainly agree with you that due process applies. It is up to Owens-Corning to determine what they wish to do with their employees that they have asked to come to Illinois to testify. If they don't come, then it's a matter of what Owens-Corning is going to do with them. If they figure that they got a better deal in this Court, a better judgment than they had anticipated, they may pat them on the back and say, "We're glad you chose to ignore our directions to appear in court in Illinois."

On the other hand, if they suffer a significant loss as a result of a default being entered against them, then at that point they may say, "Well, you know, our loss is directly attributable to Dr. Boeschenstein and Dr. Konzen not going to Illinois, and, and, therefore, we are going to terminate them." And if they do, that's just the economic marketplace of the State of Illinois and the State of Ohio.

. . . .

THE COURT: All right. I am simply going to strike the special and limited appearance and order that Owens-Corning produce the witnesses pursuant to Supreme Court Rule 237.

. . . .

THE COURT: All right. I guess that I agree, that the Plaintiff could go to Ohio and take the depositions of those people. Instead, the Plaintiff here has chosen to present their testimony in person and has proposed to produce them pursuant to Supreme Court Rule 237. It is the purpose of Supreme Court Rule 237 to require that parties produce agents, officers, employees. It is not limited to corporations. It is not just applicable to corporations. It is applicable to anybody who acts as a principal and who has agents who are within his employ. It applies to all of them across the board. It is not more burdensome on corporations than it is on individuals except to the extent that corporations may have more agents than individuals do, but it applies across the board to everyone who chooses to employ an agent or who has officers or directors. It applies to all, and the purpose of Supreme Court Rule 237 is to avoid all of the problems that are associated with compelling out of state witnesses to appear at a place outside of the State of Illinois to petition a court to compel them to appear at a certain time and place and to submit to the taking of their evidence depositions and so forth.

It is the very purpose of Supreme Court Rule 237 to avoid those problems. Those problems still have to be surmounted when there are witnesses who are not within the control of any party. If Dr. Konzen were to rescind his position with Owens-Corning Fiberglas effective at the close of business today, if Mr. Boeschenstein were to

retire from the Board of Directors at the close of business today, then the Plaintiff would necessarily be stuck with having to go to the State of Ohio and asking the Ohio Court to compel those people to submit to the taking of their depositions.

By means of Rule 237, they are not required to do that. They can simply serve a notice on Owens-Corning to produce their servants and employees and agents here in the State of Illinois.

If the Board of Directors meeting were being held in Chicago, Illinois and Mr. Boeschenstein chose not to appear for that, then I suppose it would be up to the shareholders of Owens-Corning Fiberglas whether they wished to re-elect him, or whether they wished to get a director who would be more diligent in attending board meetings. Likewise, if he chooses to thumb his nose at Owens-Corning's direction to appear here to testify, he may do that. The shareholders of Owens-Corning Fiberglas may choose then to not re-elect him to the Board of Directors if he subjects the corporation to liability, or they may choose to just overlook that and say he makes such a valuable contribution to our organization that we are not going to vote him off the Board, and, likewise, of Mr. Konzen, Dr. Konzen, they may choose to continue to employ him. He makes a valid contribution to the success of the corporation, and it would be very difficult to replace, or they may choose to take disciplinary action against Dr. Konzen for wilful neglect of his duties when requested to travel to Illinois to testify.

So it is my position that it is the very purpose of Rule 237 to compel out-of-state witnesses, in particular. It is just a matter of convenience within the State of Illinois that you don't have to send the Sheriff out serving subpoenas on these people, but when it gets to out-of-state

witnesses then it is not just a matter of convenience, it is a matter that affects the ability of the Courts of the State of Illinois to carry out their function in adjudicating disputes. It goes to the very heart of the production of evidence in Court, and it is, after all, one of the burdens that goes with conducting business as modern corporations do, from coast to coast in every state. It is just a burden that goes along with the privilege of conducting that business.

So I am going, I am going to deny the motion of Owens-Corning Fiberglas to quash the Rule 237 notices for the production of Dr. Jon L. Konzen and Mr. W. W. Boeschenstein.

. . . .

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT
COUNTY OF MCLEAN

No. 89 L 187

OPAL JOHNSON, Individually and as Special Administrator for the Estate of William Johnson, deceased,

Plaintiff,

—VS.—

BRAKEGATE, et al.,

Defendants.

HEARING ON PRE-TRIAL MOTIONS

[Excerpt containing ruling of court entering default against OCF.]

REPORT OF PROCEEDINGS of the hearing before the Honorable WILLIAM T. CAISLEY, on the 7th day of November, 1991.

. . . .

THE COURT: All right. In looking at this, it does appear to me that the failure of Dr. Konzen and Mr. Boeschenstein to appear in the State of Illinois to testify in the trial of this case is serious, and it is aggravating. It is aggravated in that the Court is not able to determine for certain whether it is the wilfulness of Mr. Boeschenstein as a corporate director of the Defendant Owens-Corning

Fiberglas Corporation, and the wilfulness of Dr. Konzen, the medical director of that corporation, to disregard an order given to them by Owens-Corning Fiberglas Corporation to appear in the State of Illinois and to testify in this cause, or whether it is the corporate decision of Owens-Corning Fiberglas Corporation to direct them not to appear and to thereby disobey the order of the Court.

It is not possible based upon what this Court knows of this case for the Court to determine that issue completely. If it is the refusal of the two witnesses to appear, then they have subjected their principal to risk of grave sanctions against it, and it does appear that in the scope of this litigation that that, that their failure to appear should be determined by the Court to be the fault of the Defendant, Owens-Corning Fiberglas. I rather believe because of the seriousness of the sanctions which could be imposed upon those two witnesses, that they would choose, if directed to do so, to appear in the State of Illinois to testify in the trial of this case.

After all, they've both been, at least one of them has been deposed, and that's Dr. Konzen, just yesterday in Toledo, in the State of Ohio, and, and so it appears that it's not a situation where he doesn't know what he might be asked to testify to. It's not a situation where he lacks sufficient knowledge or anything of that kind. It does appear that he knows exactly what this is about. It does appear that both of these people have been in Bloomington, Illinois at the time that Owens-Corning Fiberglas operated the plant at 1111 West Perry Street on numerous occasions during that period of time.

They, obviously, appeared in the State of Illinois to conduct the business of their principal at that time, and it seems to me that they would likewise do so at this time if they were directed to do that by the Defendant. Dr.

Konzen is subject to termination of his employment by Owens-Corning Fiberglas, or reduction in pay, or demotion, or suspension, or any of the things that employers have a right to do with respect to employees who are employed at will.

It does appear that Mr. Boeschenstein is not simply an employee. He is a director, and if he fails to carry out his fiduciary obligations with respect to his service as a director of the corporation, he may thereby become liable to shareholders who bring an action against him for breach of his fiduciary obligations, and he may also be subject to a derivative suit against him, and he is also subject, of course, to the ultimate sanction which shareholders retain, and that is to vote him out of office. He must obviously feel that in not coming to the State of Illinois that he is serving the best interests of his principal and can establish in any shareholder litigation that his action was not a breach of his fiduciary obligation and was, in fact, promoting the interests of his employer, of his corporation, of which he is a director, by not coming to the State of Illinois.

Thus, it appears to me that it is a matter of wilfulness on the part of the Defendant Owens-Corning Fiberglas, because otherwise, the penalties upon, the economic penalties that could be visited upon both Dr. Konzen and Mr. Boeschenstein for failing to appear are so heavy that it does not seem to the Court that they would be inclined not to appear in the State of Illinois on a single day when they are healthy individuals and able to make the trip and so forth, that they would not appear here to do that. So I can only conclude, based upon that analysis, because I have no direct evidence one way or another, that it is, in fact, the Defendant Owens-Corning Fiberglas which is directing them not to appear here, and that equates to me to be a matter of wilfulness.

Most of the cases which have been decided under Supreme Court Rule 219, which imposes sanctions for violation of various Supreme Court Rules relative to civil litigation in the Trial Court, relate to cases of failure to comply with discovery, and there are cases that say that this is aggravated, an aggravated situation, this is a, one which should have been handled simply on a motion to compel and so forth and so on.

All of those things are fine when you analyze Supreme Court Rule 219 with respect to violation of discovery orders. This is not a discovery order. This is an order, or this is a, for violation of a Supreme Court Rule, Rule 237, which has to do with the production of evidence in Court.

Now, I think most Judges have a pretty healthy respect for the role of discovery in civil litigation, and wish to promote discovery in civil cases because they believe that it will facilitate the resolution of civil litigation by bringing about settlements or simplifying issues, or making the case go more smoothly and more quickly when the trial begins, and, therefore, the Court system has a vested interest in promotion of discovery, but if the Court system has a vested interest in the promotion of discovery, it has a much greater interest in the production of people to testify at trial, and that goes to the very heart of the truth seeking process. The production of witnesses, the production of testimony in Court.

If Courts do not have the authority to compel people who are in possession of knowledge concerning the matters which are being litigated, if they do not have the authority to compel the production of documentary evidence, if they do not have the, these resources, then there can be no due process, and, and the goal of seeking the truth and doing justice is going to be thwarted, and I think this is stated simply to indicate the importance that the

Court attaches to the production of witnesses, and while sanctions for failure to comply with discovery are important, it seems to me that it is much more important in this case, because this does not relate to discovery but relates to production of evidence at trial.

Therefore, I do think that it is not unreasonable for the Court to strike the answer of the Defendant Owens-Corning Fiberglas and to order a default and to order that the case be tried on the issue of damages only in this situation, and if the Plaintiff, or if the Defendant wishes to do so, I would be happy to consider, to reconsider that if they are willing to produce Mr. Boeschenstein and Dr. Konzen to testify here, and the Court would be willing to make concessions with respect to trying to arrange a convenient time schedule for their appearance to testify, but if the Defendant remains confirmed in its decision not to produce those two agents and employees, then that's my decision.

. . . .

Supreme Court, U.S.
FILED
APR 22 1993
OFFICE OF THE CLERK

No. 92-1432

In The

Supreme Court of the United States

October Term, 1992

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

v.

OPAL JOHNSON, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF WILLIAM JOHNSON, DECEASED,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Fourth District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

As is more fully demonstrated in her Statement of the Case and Argument, Respondent denies that Petitioner "presented" the "question" which appears in its brief, because Petitioner did not adequately raise that question in the state court.

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STATEMENT OF FACTS

Owens-Corning Fiberglas Corporation (OCF) purchased the asbestos plant located at 1111 West Perry Street, Bloomington, Illinois, effective April 15, 1970. Bill Johnson was employed at the plant by OCF from that date into 1977.

Within the first two weeks after OCF purchased the plant, Dr. Jon Konzen, OCF's Medical Director, reviewed the potential health hazards of the plant with the plant manager, J. J. Young, and began reviewing the health status of the production employees. [R.C1930.] By July 8, 1970, Konzen had arranged for an industrial hygiene survey of the manufacturing operations. [R.C1931-32.]

By July 14, 1970, Konzen had received partial results of the survey and stated in an internal memorandum: "This study demonstrates immediate need for in-plant environmental control of asbestos so our employees do not continue to be severely exposed to airborne asbestos fiber. Such ventilation as is currently operating at the plant is totally inadequate. It is suggested, to limit both the occupational health hazards and the legal liability, steps be undertaken. . . . " [R.C2023.]

On September 2, 1970, Konzen reviewed the medical requirements of the operation with the new plant manager. [R.C1937.] By November 2, 1970, Konzen had issued a new medical program for the plant. [R.C1938-39.] On November 20, 1970, Konzen inspected the plant and conferred with plant physician, Dr. George McNeely. [R.C1940.] On November 27, 1970, McNeely mailed Konzen the results of the physical examinations of plant employees, of which Bill Johnson was one. [R.C2059-60.]

By January 6, 1971, Dr. Konzen had directed that the chest x-rays of all plant employees be sent to a consultant. [R.C1941.] By March 29, 1971, Konzen had himself reviewed the x-ray films and the consultant's readings. [R.C1945.]

On April 7, 1971, Konzen met with W. W. Boeschenstein, president of OCF, to discuss the "Bloomington asbestos exposure." [R.C1947-48.] On April 8, 1971, Konzen was in Bloomington to review the "procedure for further medical evaluation of individuals suspected of having asbestosis." [R.C2053.] Bill Johnson was one of those individuals. [R.C2057.]

Bill Johnson died November 29, 1987. Plaintiff filed suit on September 19, 1989, alleging that OCF intentionally caused the death of her husband.

On October 14, 1991, Plaintiff served a request under Illinois Supreme Court Rule 237(b) that OCF produce Dr. Konzen and W. W. Boeschenstein at trial. [R.C1664.][1] On

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[1] As of October 14, 1991, there had never been a trial of any plaintiff's claim that OCF had intentionally caused injury to, or the death of, a Bloomington plant worker. On March 19, 1991, Judge William Caisley (the judge who tried the instant case) commenced a jury trial in the Circuit Court of McLean County (case no. 85 L 368) where Betty Vance was the plaintiff and OCF was the defendant. Mrs. Vance had alleged, as Plaintiff did in the instant case, that her husband was employed at the Bloomington plant and died from lung cancer caused by the intentional misconduct of OCF. During opening statement in *Vance*, counsel for OCF told Judge Caisley and the jury that Dr. Konzen would appear as a witness at trial. "[OCF hired] George McNeely to do physical examinations of everyone to get an idea of what the base line physical [health] of each of the workers

October 30, OCF filed a motion to quash Plaintiff's Rule 237(b) notice. [R.C1917.] Plaintiff filed a response [R.C1927] to which she attached copies of a number of OCF internal documents demonstrating the substantial personal involvement that Konzen and Boeschenstein had in identifying, discussing and reacting, or failing to react, to the hazards created by the airborne asbestos at the Bloomington plant during the period 1970-74, as well as OCF's evaluation of the amount of asbestos disease among the workers, including Bill Johnson. Following a hearing on November 1, 1991, the trial court denied OCF's motion to quash.[2]

On November 4, OCF filed a petition with the Illinois Supreme Court requesting, among other things, a stay of

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was, and they told him, and Mr. Konzen will tell you that he told him to let the workers know if they had a problem." [Appendix to this Opposition at 18a.] The *Vance* case was settled before Dr. Konzen testified.

[2] At page 6 of its petition to this court, OCF represents that "[i]t was undisputed that the individuals lacked minimum contacts with Illinois." Although neither the language of Rule 237(b), nor the Appellate Court's construction of the rule, limits the application of the rule to only those officers, directors or employees who had minimum contacts with Illinois, it certainly is *not* "undisputed that [Konzen and Boeschenstein] lacked minimum contacts with Illinois." Instead, it is undisputed that they did have more than minimum contacts with Illinois regarding the matters out of which this suit arose. For example, Konzen made seven different trips to the Bloomington plant while Bill Johnson worked there. A corporation can act only through its directors, officers and employees. Konzen and Boeschenstein were two of the officers through which OCF performed the intentional misconduct which was the basis of Opal Johnson's claim against OCF.

the trial until that court ruled upon OCF's petition for mandamus. The Illinois Supreme Court denied the petition for stay on November 5.

The case was called for trial on November 7, 1991. OCF announced that it would not be producing Konzen and Boeschenstein. [Volume IX of Record at 9.] OCF asked the court to preclude Plaintiff from calling Konzen or Boeschenstein to the stand in the presence of the jury and to order Plaintiff to move for whatever sanctions Plaintiff felt were appropriate before jury selection commenced. [Vol. IX at 33-35.] The court granted OCF's motion. [Vol IX at 35.]

Plaintiff requested, pursuant to Illinois Supreme Court Rule 219(c), that the trial court sanction OCF for its failure to produce Konzen and Boeschenstein by striking OCF's pleadings and entering judgment by default, leaving the amount of damages as the only issue for the jury to determine. [Vol. IX at 36-37.] Plaintiff supported her motion with the narrative statement by her counsel of what the testimony of Konzen and Boeschenstein would have been had OCF not refused to produce them. [Vol. IX at 37-42.] OCF denied that Plaintiff had accurately stated what Dr. Konzen's testimony would have been had OCF not refused to produce him. [Vol. IX at 43.] Plaintiff then called Konzen and Boeschenstein to the witness stand for the limited purpose of showing "by question and answer what their testimony would be if they were produced and testified before the Jury so that [Plaintiff] can eliminate any controversy that exists between what [Plaintiff says] in narrative form their testimony would be . . . and what their testimony would be." [Vol. IX at 48.] OCF refused to

produce Konzen and Boeschenstein for even that limited purpose. [Vol. IX at 49.]

There was no evidence that OCF had directed Konzen or Boeschenstein to appear. The trial court found that OCF had not directed Konzen or Boeschenstein to appear. The court reasoned that given the serious consequences to Konzen and Boeschenstein of their refusal to appear if they had been directed to do so, it was far more probable that OCF had directed Konzen and Boeschenstein not to appear. [Vol. IX at 49-52.] The court concluded that OCF had wilfully violated Rule 237(b). [Vol. IX at 52.] The following reflects the court's analysis and ruling on Plaintiff's motion for sanctions:

> "[T]he failure to produce witnesses pursuant to Supreme Court Rule 237 is even more crucial to the operation of the court system and central to its function to administer justice and to seek the truth than [the violation of] Supreme Court Rules relative to discovery; and that the action of the defendant in failing to comply with Supreme Court Rule 237 is wilful and constitutes an aggravated violation of the Supreme Court Rules and that the sanction of striking the defendant's pleadings and entering a default order against the defendant, Owens-Corning Fiberglas Corporation is in proportion to the grievousness of its violations in failing to produce Doctor Konzen and Mr. Boeschenstein." [R.C15.]

OCF moved for a recess. The court advised OCF that it would vacate the default order if OCF were to reconsider and produce the witnesses. The court then recessed for lunch. After lunch OCF announced that it would

continue in its refusal to produce Konzen and Boeschenstein, and thus not avail itself of the opportunity to avoid the sanctions. [Vol. IX at 54-56; R.C16.]

OCF's counsel also described to the trial court OCF's motivation in failing to have its employees present. "[T]he only reason Dr. Konzen and . . . Mr. Boeschenstein are not here is because we don't feel that we can have them coming over here and, constantly in the many plant worker cases that Mr. Walker has, and we decided to make an issue of it to the extent that maybe we can get an Appellate decision. We'll certainly abide by what the Appellate Courts decide once the issue is truly litigated to a conclusion at, at that level." [Vol. X at 19.][3]

The jury returned a verdict for Plaintiff [R.C2101] upon which the court entered judgment. [R.C2121.] OCF's post-trial motion [R.C2198] was denied on January 28, 1992. [R.C2252.] OCF filed its notice of appeal on February 26, 1992. [R.C2268.]

OCF appealed to the appellate court for the Fourth District of the State of Illinois. Consistent with briefing requirements at the appellate level, OCF listed those "statutes involved" in its Appellant's Brief. The Fourteenth Amendment was not listed. [Opposition Appendix at 6a-7a.] In its Reply Brief before the appellate court, OCF again cited statutes as authorities in support of its

---

[3] OCF has not abided by the Appellate Court's decision. The Appellate Court's decision was filed August 27, 1992. Three of the other instances of wilful Rule 237(b) violations to which OCF admits at page 15, fn. 7, of its petition (*Smith, Gerzsenye* and *Costa*), were committed after August 27, 1992.

position. No citation was made to the Fourteenth Amendment. [Opposition Appendix at 9a.] Neither in its initial Appellant's Brief, nor its Reply Brief, did OCF assert that the trial court's ruling as to OCF was an attempt to require OCF to engage in "state action."

After the appellate court affirmed the judgment against OCF, OCF filed its Petition for Leave to Appeal with the Illinois Supreme Court. As in the appellate court, in the "Points and Authorities" at the beginning of OCF's petition, no citation to the Fourteenth Amendment occurred. [Opposition Appendix at 13a-16a.]

REASONS FOR DENYING THE WRIT

I.

OCF HAS FAILED TO PRESERVE FOR REVIEW ANY ISSUES AS TO THE FOURTEENTH AMENDMENT OR STATE ACTION.

OCF's petition to this Court cites, and quotes, the Fourteenth Amendment to the United States Constitution as the "Constitutional Provision and Rule Involved". Illinois Supreme Court Rule 341(e)(1) mandated that OCF's Appellant's Brief contain "a summary statement, entitled 'Points and Authorities,' of the points argued and the authorities cited in the Argument. This shall consist of the headings of the points and subpoints as in the Argument, with the citation under each heading of the authorities relied upon or distinguished, and a reference to the page of the brief on which each heading and each authority appear." OCF never cited the Fourteenth Amendment in its "Points and Authorities" [Opposition Appendix at

1A-5A] section of its Appellant's Brief in direct contravention of the requirement of Illinois Supreme Court Rule 341(e)(1).

OCF did not cite the Fourteenth Amendment in that section of its Appellant's Brief entitled "Statutes Involved." [Opposition Appendix at 6a-7a.] The "Table of Points and Authorities" of OCF's Reply Brief and the "Points and Authorities" section of its Petition for Leave to Appeal to the Illinois Supreme Court were silent as well, containing no citation or quotation of the Fourteenth Amendment. [Opposition Appendix at 8a-16a.]

The failure by OCF to provide any citation to, or quotation of, the Fourteenth Amendment as authority in support of its position to the appellate or supreme courts of Illinois reflects that OCF did not adequately present to the state courts any federal question regarding the Fourteenth Amendment. OCF has failed to preserve the issue of the Fourteenth Amendment for this Court's review.

OCF has also failed to preserve for this Court's review any issue as to whether the trial court's ruling was state action subject to the Fourteenth Amendment. OCF spends a substantial portion of its petition to this Court, pages 7-13, alleging that the application to OCF of the Illinois trial court's ruling would require OCF to engage in "state action." Just as OCF failed to cite or quote the Fourteenth Amendment in support of its argument to the appellate court, OCF also failed to ever assert to the Illinois appellate court the issue of state action.

Not surprisingly, the appellate court never discussed whether the trial court's application of Illinois Supreme

Court Rule 237(b) would force OCF to engage in state action, since that issue was not raised by OCF in its appellate court briefs. There can be no "review" to this court of an alleged federal question that was not raised by OCF in the Illinois appellate court, nor decided by that court. *Durley v. Mayo*, 351 U.S. 277, 285 (1956).

II.

OCF HAS FAILED TO DEMONSTRATE A DENIAL OF A RIGHT GRANTED TO IT BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is impossible to determine from a reading (or a rereading) of OCF's petition whose Fourteenth Amendment rights it claims have been violated. Plaintiff submits that OCF intentionally avoided providing the answer to this question, because to do so would demonstrate the shortcoming of OCF's petition.

"Due process" has been construed to include "notice." Without question OCF had notice of the suit (it was served with summons) and notice of Plaintiff's Rule 237(b) request (OCF admitted to receiving the request). OCF was not denied "notice."

Due process has been construed to include "an opportunity to be heard." OCF filed an answer to the suit and a motion to quash Plaintiff's Rule 237(b) request. OCF was granted a hearing on its motion to quash at which time it stated all that it wished to state in support of its motion. OCF was not denied an opportunity to be heard.

"Due process" has been construed to include the right not to be forced to defend a case in a state in which one has not had at least minimal contacts. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). OCF clearly had and still has more than minimal contacts with Illinois. This case arose from OCF's operation of an asbestos plant in Illinois where decedent was employed for seven years during OCF's ownership. OCF was and still is physically present in Illinois.

No part of the instant case has resulted in OCF being denied any rights granted to it by the due process clause of the Fourteenth Amendment.

III.

OCF HAS FAILED TO DEMONSTRATE THAT EITHER KONZEN OR BOESCHENSTEIN HAS BEEN DEPRIVED OF HIS LIFE, LIBERTY OR PROPERTY.

The Fourteenth Amendment provides that "nor shall any State deprive any person of life, liberty or property without due process of law." No one, not Plaintiff, not the Illinois court system, not even OCF itself, has done anything to deprive Konzen or Boeschenstein of his life, liberty or property. They were not served with process. They were not threatened with imprisonment, a fine or a judgment. OCF neither fired them nor threatened to fire them. This record is silent as to whether OCF even actually *asked* either of them to go to Illinois.

Even if Konzen or Boeschenstein had been directed to, and did, appear in Illinois, the time and effort involved is not the type of deprivation of liberty or

property to which the due process clause of the Fourteenth Amendment applies.

In *Hurtado v. United States*, 410 U.S. 578, 588-89, 93 S.Ct. 1157, 1164 (1973), this Court held that even the pretrial incarceration of a witness is not a "taking" under the Fifth Amendment because "the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed. * * * It is beyond dispute that there is in fact a public obligation to provide evidence . . . and that this obligation persists no matter how financially burdensome it may be."

If the "detention of a material witness . . . is simply not a 'taking' under the Fifth Amendment" (*Hurtado*, 410 U.S. at 589, 93 S.Ct. at 1164), the time and effort it would have taken Konzen and Boeschenstein, in the course of their duties as an OCF officer and director, to appear in Illinois is not a deprivation of liberty or property under the Fourteenth Amendment. See *United States v. Friedman*, 532 F.2d 928, 935 (3d Cir. 1976); *In re Grand Jury No. 76-3*, 555 F.2d 1306, 1308-09 (5th Cir. 1977); *United States v. Doe*, 457 F.2d 895, 897-98 (2d Cir. 1972).

IV.

OCF'S REFUSAL TO COMPLY WITH ILLINOIS SUPREME COURT RULE 237(b) HAS NOT LED TO "RAMPANT LITIGATION ABUSE."

In part II of its petition, OCF charges that application of Illinois Supreme Court Rule 237(b) to OCF has led to "rampant litigation abuse."

OCF alleges that the issue of state court rules requiring employers to produce their employees as witnesses "frequently recurs at the trial-court level." The "frequently recurring" issue occurs only due to OCF's continuing noncompliance.

According to OCF there are a total of six other cases where the issue has arisen. When the national counsel selected by OCF to try this case was before the trial court, he admitted that:

> "[T]he only reason Dr. Konzen and Dr., and Mr. Boeschenstein are not here is because we don't feel that we can have them coming over here and, constantly in the many plant worker cases that Mr. Walker has, and we decided to make an issue of it to the extent that maybe we can get an Appellate decision. We'll certainly abide by what the Appellate Courts decide once the issue is truly litigated to a conclusion at, at that level." [Vol. X at 19.]

Once the Illinois appellate court issued its decision, what was OCF's response? The week after the appellate court filed its decision in this case, OCF refused to produce Konzen in *Costa v. OCF*, No. 88 L 239 (Ill. Cir. Ct., 10th Judicial Cir., Peoria County) [Petition at 15, fn. 7].

The Illinois Supreme Court denied OCF's petition for leave to appeal on December 2, 1992. In January, 1993, OCF again refused to produce any officer or director in two of the cases listed in OCF's Petition at 15, fn. 7 – *Smith v. OCF*, and *Gerzsenye v. OCF*. If OCF, in good faith (as opposed to trial strategy due to a concern over the admissions its employees would make in front of a judge

and jury) wanted to pursue the issue of the validity of Illinois Supreme Court Rule 237(b), OCF could have continued its review in this case and, in the interim, produced the agents requested by opposing parties.

The additional sanctions that have been entered against OCF, due to its refusals to produce in other cases, is a risk that Owens-Corning has chosen to take. OCF refers to the *Pickering* decision. [OCF Petition at 15.] Contrary to OCF's suggestion that *Pickering* has "cost" OCF $10.5 million, OCF has yet to pay the judgment from which it has appealed.

In *Pickering*, OCF attempted to interest the Seventh Circuit Court of Appeals in this dispute. As Judge Easterbrook stated, in authoring the opinion which denied OCF's request for an injunction against the Illinois trial court:

> "That there are costs of being right is an acceptable incident of an orderly legal system. That there are costs of being wrong – that Owens-Corning may pay damages if it stakes its all on its legal position and loses – is positively desirable, and a federal court should not interfere . . . Self-control in advancing legal positions is a prime objective of any system of adjudication." *Owens-Corning Fiberglas Corp. v. Moran*, 634 F.2d 634, 636 (7th Cir. 1992).

OCF alleges that, if it produces any officer, director, or employee, OCF's agents "virtually would become full-time witnesses. . . . " [OCF's petition at 15.] Contrary to the implication in OCF's petition, Dr. Konzen and Boeschenstein have never testified before a judge or jury

in an Illinois courtroom. To Plaintiff's knowledge, neither Konzen or Boeschenstein have ever set foot in any courtroom to discuss OCF's conduct regarding asbestos.

Although Dr. Konzen repeatedly traveled to Bloomington at the behest of OCF when it served the corporate purposes of OCF, on each occasion when an Illinois plaintiff has requested his presence in open court (where a trial judge presides, ready to rule instantly on any OCF objections to questions posed to the witness concerning earlier activities and writings) OCF has uniformly refused to produce Konzen. The same is true of Boeschenstein.

Finally, OCF believes it can state the "real agenda" behind a plaintiff's use of Rule 237(b) directed to OCF. OCF states Opal Johnson's desire was to "harass or pressure" OCF, rather than obtain testimony. [OCF Petition at 15, fn. 8.] In support of this contention, OCF states that since Plaintiff did not depose Konzen or Boeschenstein before they took the witness stand, Plaintiff could not have believed the individuals had important information.

At the trial level, Plaintiff showed the materiality of Konzen and Boeschenstein's knowledge to the issues in this case by supplying internal documents of OCF authored, or received, by those individuals. The same Plaintiff's counsel who represents Opal Johnson first deposed Jon Konzen in an asbestos case on December 3 and 4, 1980 (eleven years before the trial in this case). OCF's suggestion that Plaintiff's counsel had no idea what Konzen would say is wrong. Not only did Plaintiff's counsel have the transcript of the discovery deposition taken in 1980 of Konzen, Plaintiff's counsel also had

copies of transcripts taken in other cases, by other plaintiffs, of Konzen and Boeschenstein.

Of course, any attempt by Opal Johnson to add to that testimony was vigorously opposed by OCF. On May 12, 1991, (six months before trial) OCF responded to Plaintiff's First Request for Discovery by admitting OCF possessed a transcript of a deposition Konzen had given on May 12, 1990. [R.C1214.] Plaintiff requested a copy of that transcript on June 19. On July 7, when OCF had refused to supply the transcript, Plaintiff moved to compel OCF to produce a copy. [R.C1327.] OCF filed a written opposition, which the trial court overruled. The court ordered OCF, on August 21, 1991, to provide Plaintiff with a copy of the transcript by September 15. [R.C10.] OCF moved to reconsider. The trial court denied OCF's motion on October 18, 1991, directing OCF to produce the transcript by October 31, 1991. [R.C1855.]

Only on November 1, after Plaintiff informed the trial court that OCF still had not produced the transcript (and after the court ordered OCF to produce a copy instanter) did OCF finally pull from its files a copy of the Konzen deposition transcript. [R.C1993.] OCF's conduct in requiring three orders from the trial court before OCF would produce a transcript diminishes the credibility of OCF's assertion that any plaintiff could easily take a deposition where Konzen would answer all relevant questions without interference from a phalanx of OCF attorneys.

OCF's decision to allow itself to be repeatedly sanctioned, even after appellate review, reflects the "real agenda" behind OCF's trial strategy – refusal to produce any employee whose testimony would be harmful to OCF

in any forum where a trial judge can swiftly rule on attempts by OCF to prevent admissions from those employees from becoming part of the public record.

CONCLUSION

Respondent requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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GENERAL NO. 4-92-0175

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

OPAL JOHNSON, Individually and as Special Administrator for the Estate of WILLIAM JOHNSON, Deceased

Plaintiff/Appellee,

v.

OWENS-CORNING FIBERGLAS CORPORATION, et al.,

Defendant/Appellant.

Appeal From The Circuit Court of The Eleventh Judicial Circuit of McLean County, Illinois Circuit Court No. 89 L 187
The Honorable William T. Caisley, Judge Presiding

BRIEF OF DEFENDANT-APPELLANT OWENS-CORNING FIBERGLAS CORPORATION

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STATUTES INVOLVED

I. *Supreme Court Rule 237(b)* states as follows:

> **(b) Notice of Parties, et al.** The appearance at the trial of a party or a person who at the time of trial is an officer, director, or employee of a party may be required by serving the party with a notice designating the person who is required to appear. The notice also may require the production at the trial of documents or tangible things. If the party or person is a nonresident of the county, the court may order any terms and conditions in connection with his appearance at the trial that are just, including payment of his reasonable expenses. Upon a failure to comply with the notice, the court may enter any order that is just, including any order provided for in Rule 219(c) that may be appropriate.

Ill. Ann. Stat. ch. 110A, para. 237(b) (Smith-Hurd 1985).

II. *Supreme Court Rule 219(c)* states as follows:

> **(c) Failure to Comply with Order or Rules.** If a party, or any person at the instance of or in collusion with a party, unreasonably refuses to comply with any provision of part E of article II of the rules of this court (Discovery, Requests for Admission, and Pretrial Procedure) or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:
>
> (i) that further proceedings be stayed until the order or rule is complied with;

(ii) that the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;

(iii) that he be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;

(iv) that a witness be barred from testifying concerning that issue;

(v) that, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that his action be dismissed with or without prejudice; or

(vi) that any portion of his pleading relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue.

In lieu of or in addition to the foregoing, the court may order that the offending party or his attorney pay the reasonable expenses, including attorney's fees incurred by any party as a result of the misconduct, and by contempt proceedings compel obedience by any party or person to any subpoena issued or order entered under the rules. Notwithstanding the entry of a judgment or an order of dismissal, whether voluntary or involuntary, the trial court shall retain jurisdiction to enforce, on its own motion or on the motion of any party, any order imposing monetary sanctions, including such orders as may be

entered on motions which were pending hereunder prior to the filing of a notice or motion seeking a judgment or order of dismissal.

Ill. Ann. Stat. Ch. 110A, para. 219(c) (Smith-Hurd Supp. 1991).

III. *Article I, Section 2 of the Illinois Constitution States as follows:*

Due Process and Equal Protection

No person shall be deprived of life, liberty or property without due process of law nor denied the equal protection of the laws.

GENERAL NO. 4-92-0175

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL CIRCUIT

OPAL JOHNSON, Individually and as Special Administrator for the Estate of WILLIAM JOHNSON, Deceased

Plaintiff/Appellee

v.

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Defendant/Appellant.

Appeal From the Circuit Court of The Eleventh Judicial Court of McLean County, Illinois
Circuit Court No. 89 L 187
The Honorable William T. Caisley, Judge Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT OWENS-CORNING FIBERGLAS CORPORATION

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No. ___

IN THE
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OPAL JOHNSON, Individually and as Special Administrator for the Estate of WILLIAM JOHNSON, Deceased,

Plaintiff-Respondent,

v.

OWENS-CORNING FIBERGLAS CORPORATION,

Defendant-Petitioner,

and

BRAKEGATE, LTD., CHARTER CONSOLIDATED, PLC, CHARTER CONSOLIDATED SERVICES, LTD., CENTRAL MINING FINANCE, LTD., THE CONSOLIDATED MINES SELECTION COMPANY, LTD., BRITISH SOUTH AFRICA COMPANY, CAPE ASBESTOS FIBRES, LTD., EGNEP (Pty) LIMITED, GATKE CORPORATION, ABEX CORPORATION, H.K. PORTER COMPANY, INC., NORTH AMERICAN ASBESTOS CORPORATION,

Defendants.

PETITION FOR LEAVE TO APPEAL

From the Appellate Court of Illinois, Fourth District, No. 4-92-0175, There Heard on Appeal from the

Circuit Court, County of McLean, Illinois, No. 89L187,
Honorable William T. Caisley, Judge Presiding

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT

McLEAN COUNTY, ILLINOIS

BETTY VANCE, et al,	)	
Plaintiffs,	)	
	)	McLean County
vs.	)	Case No. 85 L 368
UNARCO INDUSTRIES, et al,	)	(Filed
	)	MAY 28 1992)
Defendants.	)	

OPENING STATEMENT OF DEFENDANT,
OWENS CORNING FIBERGLASS

REPORT OF PROCEEDINGS of the trial before the HONORABLE WILLIAM T. CAISLEY, and a Jury, on the 19th day of March, 1991.

APPEARANCES:

MR. JAMES WALKER,
MR. JAMES WYLDER,
ATTORNEYS AT LAW,
For the Plaintiffs.

MR. ROBERT MARTIER,
MR. EDGAR NEELY,
ATTORNEYS AT LAW,
For the Defendant, Owens Corning Fiberglass.

Kathy L. Fulks, CSR, CM
Official Court Reporter
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Bloomington, IL 61701
(309) 888-5251

MR. NEELY: I'm not a speaker without notes. Members of the Jury, my name is Edgar Neely, and Bob Martier and I represent Owens Corning Fiberglass.

* * *

Now, I want to shift the gears a little bit and tell you about Owens Corning Fiberglass.

* * *

They taught, they hired a man, as he said, George, George McNeely – no relation to me – my name's Neely, but no McNeely – George McNeely to do physical examinations of everyone to get an idea of what the base line physical held of each of the workers was, and they told him, and Mr. Konzen will tell you that he told him to let the workers know if they had a problem.

Supreme Court, U.S.
FILED
APR 30 1993
CLERK

No. 92-1432

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

—v.—

OPAL JOHNSON, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF WILLIAM JOHNSON, DECEASED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

PETITIONER'S REPLY BRIEF

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April 30, 1993

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IN THE

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OCTOBER TERM, 1992

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OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

—v.—

OPAL JOHNSON, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF WILLIAM JOHNSON, DECEASED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

PETITIONER'S REPLY BRIEF

Respondent's ("plaintiff's") opposition to petitioner Owens-Corning Fiberglas Corporation's ("OCF's") petition studiously ignores this Court's state-action jurisprudence and instead hides behind erroneous waiver arguments and other smokescreens. Plaintiff has grossly misrepresented the record—and has not even attempted to rebut OCF's state-action argument.

I.

OCF Preserved Its Federal Constitutional Arguments.

Plaintiff's assertion that OCF failed to preserve its Fourteenth Amendment due-process arguments in the state appellate courts is simply wrong.[1]

First, OCF's opening brief in the Illinois Appellate Court contained express references to "federal due process" [1a, 2a] and discussed the requirements of federal due process separately from those of Illinois due process [2a & n.5]. The brief also cited several of this Court's Fourteenth Amendment due-process decisions. [*Id.*]

Second, OCF's reply brief in the Appellate Court again relied on federal due-process principles. [5a, 6a, 7a; Resp. Br. 10a.]

Third, contrary to plaintiff's representation [Resp. Br. 8], OCF's petition for leave to appeal to the Illinois Supreme Court expressly asserted "the due process guarantee of the fourteenth amendment to the United States Constitution" [9a], which it also referred to as "federal due process" [8a, 12a, 13a] and "Due Process Requirements of the . . . United States Constitution" [12a; Resp. Br. 16a].

These discussions of "federal due process" and citations to this Court's Fourteenth Amendment decisions therefore raised the federal due-process question in the state courts—even though the Fourteenth Amendment and its state-law counterpart were not specifically listed in OCF's state-court tables of points and authorities and the Fourteenth Amendment's text was not quoted in the "Statutes Involved" section of OCF's opening brief to the

---

[1] Plaintiff does not dispute OCF's statement [Cert. Pet. 4-6] that OCF initially raised the federal question in the trial court. [*See* Resp. Br. 7-9.]

Illinois Appellate Court. This Court's "jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 114 n.9 (1982); *see Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978) (reference in trial court to "fundamental principle[s] of judicial fair play" suffices to preserve federal due-process claim); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-69 (1928) (general references to unconstitutionality suffice to preserve federal equal-protection claim in view of other indications that claim rests on Fourteenth Amendment's Equal Protection Clause).

Moreover, the Illinois Appellate Court cannot be said to have disposed of OCF's appeal on an adequate and independent state due-process ground. Illinois may offer greater protection of individual rights than the federal Constitution requires, but it cannot offer less. When the Illinois Appellate Court rejected OCF's due-process claims without distinguishing between federal and state grounds [Cert. Pet. 11a], it therefore necessarily decided both the federal-law and the state-law questions presented in OCF's briefs.[2]

Plaintiff's representations that "OCF . . . failed to ever assert to the Illinois Appellate Court the issue of state action" [Resp. Br. 8] and that the Appellate Court never decided the issue [*id.* at 9] are also incorrect. OCF's appellate briefs cited this Court's state-action ruling in *Truax v. Raich*, 239 U.S. 33, 38-39 (1915), and specifically argued that the State could not use a private corpo-

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[2] In any event, the presumption of adequate and independent state grounds in *Durley v. Mayo*, 351 U.S. 277, 285 (1956), on which plaintiff relies [Resp. Br. 9], cannot survive *Michigan v. Long*, 463 U.S. 1032 (1983), where this Court held that a state court will be presumed to have based its decision on a federal question interwoven with the issues of the case unless the face of the opinion makes clear that the state court rested its decision on an adequate and independent state ground.

ration to accomplish indirectly what it could not constitutionally do directly. [3a-4a, 5a-6a.] The Appellate Court expressly (and erroneously) addressed the state-action question when it held that,

> [a]s long as the order is directed at the corporate defendant rather than the individual employees and directors, principles of due process are not violated, and a court may sanction a corporate defendant for its failure to produce its employees. Ultimately, it is the corporate defendant which forces its employees to submit to the jurisdiction of Illinois, not the court.

[Cert. Pet. 11a.]

This Court may decide any federal question either passed on or properly raised below. *See Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Taylor v. Kentucky*, 436 U.S. at 482 n.10. Because the federal constitutional issue was both raised by OCF and decided by the Illinois courts at all stages of the proceeding, plaintiff's claim that OCF did not preserve it is simply disingenuous.

II.

Plaintiff Cannot Question the Witnesses' Lack of Sufficient Minimum Contacts with Illinois to Satisfy the Fourteenth Amendment's Due-Process Requirements for Personal Jurisdiction.

Any question about the individual witnesses' lack of sufficient minimum contacts with Illinois to support state-court exercise of personal jurisdiction under the Fourteenth Amendment is foreclosed at this point. Plaintiff never claimed below that personal jurisdiction existed, and both the trial court and the Appellate Court expressly agreed with OCF that it did not. [*See, e.g.*, Cert. Pet. 11a ("The trial court recognized it did not have personal jurisdiction over [the witnesses]."); *accord id.* at 27a-28a.]

In its briefs to the Illinois courts, OCF argued that Dr. Konzen and Mr. Boeschenstein lacked sufficient "minimum contacts" with Illinois to satisfy federal due-process requirements [2a n.5] and that "[i]t is undisputed that under the . . . due process guarantee of the fourteenth amendment to the United States Constitution, the Illinois courts cannot constitutionally exercise personal jurisdiction over Mr. Boeschenstein and Dr. Konzen" [9a]. Plaintiff never contradicted OCF's assertions in her brief in the Appellate Court or in her opposition to OCF's petition for leave to appeal to the Illinois Supreme Court.

Nor had plaintiff argued or presented evidence in the trial court concerning the alleged sufficiency of Dr. Konzen's and Mr. Boeschenstein's minimum contacts with Illinois, even though OCF had raised its Fourteenth Amendment arguments in that court [Cert. Pet. 4]. Rather, plaintiff claimed that the jurisdictional issue was immaterial because she was not "trying to get jurisdiction over these individuals" [8 R. 4]. She argued that OCF—not the court—would be coercing the individuals to appear if OCF complied with the court's order and that minimum-contacts and state-action issues therefore did not arise.

Plaintiff was fully aware of OCF's federal constitutional arguments, but she made no attempt to meet her trial-court burden of proving that the witnesses had sufficient contacts with Illinois to satisfy federal due process. The Illinois courts concluded that personal jurisdiction did not exist [Cert. Pet. 11a, 27a-28a], and plaintiff may not now try to raise a *factual* question that she waived at trial, thereby precluding OCF and the witnesses from presenting evidence on the issue. *Cf. Steagald v. United States*, 451 U.S. 204, 209-11 (1981) (failure of government to raise factual issue below precluded it from raising issue in this Court).[3]

---

[3] Even if plaintiff had not waived her chance to establish personal jurisdiction over the witnesses, and even if the trial court and

III.

Requiring the Individuals to Travel to Another State to Testify Would Have Involved a Deprivation of Their Liberty.

The State of Illinois sought to compel Dr. Konzen and Mr. Boeschenstein to leave their State of residence, travel to Illinois, appear at a specific place and time, give testimony, and remain there until they had finished testifying. While in Illinois, they could have been subject to penalties for contempt of court had they refused to respond to questions put to them—or had they chosen to leave the courtroom during their testimony. They also might have subjected themselves to the argument that they could be served with Illinois process while present in the State.

Courts therefore have long recognized that compelling a witness to testify involves an exercise of personal jurisdiction that is subject to well-established federal due-process limitations. [Cert. Pet. 7 n.4 and cases cited therein.] Moreover, plaintiff's claim that no deprivation of liberty is involved in requiring a person to travel to another State to testify ignores that freedom of movement is one of the liberties protected by the Due Process Clause, *see Kent v. Dulles*, 357 U.S. 116, 125-27 (1958).

For the reasons stated in OCF's certiorari petition, the Appellate Court erred in holding that Illinois courts may avoid those constitutional limitations by using private

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the Appellate Court had not decided the jurisdictional question, OCF still would be entitled to present evidence and be heard on this factual question on remand. Moreover, the trial court denied Dr. Konzen and Mr. Boeschenstein their own right to present evidence and be heard on this issue when it struck their special and limited appearances on the erroneous ground that it was not seeking to exercise jurisdiction over them. [Cert. Pet. 27a-29a.]

employers to coerce the attendance of witnesses beyond the courts' own reach. Where state action is present, any deprivation of an individual's right to stay or to go where he or she chooses must comport with due-process requirements. *See In re Sealed Case*, 832 F.2d 1268, 1272-74 (D.C. Cir. 1987) (subjecting witness subpoena to due-process scrutiny); *In re Marc Rich & Co.*, 707 F.2d 663, 667, 670 (2d Cir.) (same), *cert. denied*, 463 U.S. 1215 (1983).[4]

The cases on which plaintiff relies [Resp. Br. 11] hold only that the Constitution does not require the Government to pay compensation to a witness, *Hurtado v. United States*, 410 U.S. 578, 588-89 (1973) (incarceration of material witnesses before criminal trial was not taking of property requiring just compensation under Fifth Amendment); *In re Grand Jury No. 76-3*, 555 F.2d 1306, 1308-09 (5th Cir. 1977) (takings clause and Due Process Clause of Fifth Amendment did not require Government to compensate bank for cost of complying with subpoena for documents); *United States v. Friedman*, 532 F.2d 928, 935 (3d Cir. 1976) (same), and that subpoenas for bank records, for handwriting and voice exemplars, or for appearance before a grand jury do not fall within the Fourth Amendment's prohibition of unreasonable searches and seizures, *id.* at 934-35 (bank records); *United States v. Doe*, 457 F.2d 895, 897-98 (2d Cir. 1972) (handwriting and voice exemplars and appearance before grand jury), *cert. denied*, 410 U.S. 941 (1973). None of those cases addressed the courts' personal jurisdiction to compel witnesses to appear or give evidence.

---

[4] This discussion—like OCF's petition itself—should answer plaintiff's purported question about "whose Fourteenth Amendment rights [OCF] claims have been violated" [Resp. Br. 9]. Dr. Konzen's and Mr. Boeschenstein's rights are at issue. As OCF demonstrated in its petition [at 13 n.6], OCF has standing to raise those individuals' rights in defending itself against the State's action.

IV.

Plaintiff's Contention That Dr. Konzen and Mr. Boeschenstein Would Have Appeared If OCF Had Instructed Them to Do So Is Irrelevant.

Plaintiff's final argument is that OCF purportedly could have directed Dr. Konzen and Mr. Boeschenstein to appear had it wished to do so—and that those individuals would have complied with OCF's direction. This argument misses the constitutional point.

The only relevant question here is whether state action exists when a state court tries to force an employer to do something that the court cannot constitutionally do on its own. If so, then OCF was entitled to decide—free from state-court coercion—how best to use the services of its own employees and directors, and those individuals were entitled to have OCF exercise its judgment and discretion unconstrained by unconstitutional state-court compulsion.

Plaintiff's argument is no different from the one that this Court rejected in *Truax v. Raich*, 239 U.S. 33 (1915), where a non-citizen employee sued to enjoin enforcement of a state law limiting the number of aliens any employer could employ. The State argued that, because the employer could discharge any of his employees at will, the State would not be responsible for the plaintiff employee's termination even if the employer's sole motivation were to comply with the challenged state law. This Court ruled that the state statute impermissibly would have affected the employer's employment decisions and that the non-citizen employee had a "manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion." *Id.* at 38.

The Court again rejected a similar argument in *Peterson v. City of Greenville*, 373 U.S. 244 (1963), which involved blacks who had been denied service and arrested in a pri-

vate restaurant because of a local ordinance requiring racial separation. The fact that "the manager would have acted as he did independently of the existence of the ordinance" and might in fact have been happy not to serve the would-be black patrons was constitutionally irrelevant, *id.* at 248; the prospective patrons had the right to be free of unconstitutional state-sponsored conduct even if the restaurant manager privately would have made the same decision on his own. *Accord Barrows v. Jackson*, 346 U.S. 249, 253-54 (1953) (property owner may choose to honor racially restrictive covenant and not sell property to blacks, but state cannot encourage her to do so or sanction her for breaching covenant).

Here, as in *Truax*, *Peterson* and *Barrows*, the State sought to require a private party to do something—to order Dr. Konzen and Mr. Boeschenstein to travel to Illinois and testify. The State was significantly involved in the attempt to coerce the individuals to appear as witnesses, and its conduct thus had to comply with the Fourteenth Amendment's requirements. It is therefore irrelevant whether, under other circumstances, OCF might have asked Dr. Konzen and Mr. Boeschenstein to travel to Illinois or to testify in court. The individuals had a "manifest interest in the freedom of [their] employer to exercise [its] judgment without illegal interference or compulsion." *Truax*, 239 U.S. at 38.

Because the State threatened OCF with sanctions for not producing the witnesses—and imposed those sanctions when the witnesses did not appear—any decision by OCF to compel the individuals' appearance would have been "not [OCF's] voluntary choice but the State's choice," *Barrows*, 346 U.S. at 254; *see also Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (private creditor's use of state-court garnishment process directed to debtor's private employer constituted state action); *Robinson v. Florida*, 378 U.S. 153, 156-57 (1964) (racial discrimi-

nation by private restaurant constituted state action when state law put financial burden on racially integrated restaurants). The state court's conduct therefore was subject to Fourteenth Amendment constraints.

CONCLUSION

For the reasons stated in the petition and in this reply brief, the petition should be granted.

Respectfully submitted,

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April 30, 1993

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EXCERPTS FROM OCF'S BRIEF IN THE APPELLATE COURT OF ILLINOIS

. . . .

ARGUMENT

This appeal raises important issues concerning the validity and scope of Rule 237(b). First, contrary to fundamental principles of Illinois and federal due process, the trial court erroneously read the Rule to permit a party to compel the appearance at trial of an individual officer, director or employee or a party even when Illinois could not assert personal jurisdiction over that individual. Second, even were that reading correct, the trial court erred by imposing sanctions that went far beyond those authorized by Rule 219(c), which limits such sanctions to those necessary to address the prejudice suffered by the party seeking the non-appearing witness's testimony. This Court should reverse the trial court's rulings.

I. The Trial Court Lacked the Authority to Sanction OCF for the Failure of Its Employees and Director to Appear as Witnesses.

. . . .

B. An Illinois Court Does Not Have the Authority to Compel an Individual to Appear as a Witness Simply Because the Court Has Jurisdiction Over the Individual's Employer.

. . . .

As [*Salvator v. Admiral Merchant's Motor Freight*, 175 Ill. App. 3d 901, 530 N.E.2d 639 (1988)] and [*Lee v.*

Hyster Co., 156 Ill. App. 3d 214, 509 N.E.2d 586 (1987)] demonstrate, Rule 237(b) was not intended to supersede Illinois principles of due process by compelling the appearance at trial of individuals over whom the court lacks jurisdiction.[4] Nor can it supersede federal due process principles, which also prevent the trial court from compelling the appearance of these individuals at trial.[5] The trial court erred in reading Rule 237(b) to permit plaintiff to compel Dr. Konzen and Mr. Boeschenstein to appear as witnesses at trial simply because the court had

---

[4] Nothing in either the text of Rule 237(b) or the accompanying Committee Comments suggests that the provision was intended to override Illinois principles of due process. To the contrary, Rule 237(b) was intended, in the interests of *convenience*, to obviate the need to serve a trial subpoena where the court already has jurisdiction. *See Hawkins v. Wiggins*, 92 Ill. App. 3d 278, 415 N.E.2d 1179, 1184 (1st Dist. 1980). It need hardly be said that one party's due process rights may not be overridden for the mere convenience of another party.

[5] A state, or a party using the state's process powers, cannot compel the presence at trial of an individual outside of the state's boundaries absent "minimum contacts" of a type sufficient to demonstrate that the individual has, by availing himself of the "benefits and protection of the laws of th[e] state," subjected himself to that state's process powers. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 319 (1945); *see Wiles v. Morita Iron Works Co.*, 125 Ill. 2d 144, 530 N.E.2d 1382 (1988). Moreover, even where otherwise sufficient minimum contacts have been established, the assertion of jurisdiction may violate due process constraints where other factors would make such an assertion "offen[sive to] 'traditional notions of fair play and substantial justice.' " *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (citing *Int'l Shoe*, 326 U.S. at 316) (citations omitted)); *see id.*, at 113-16; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985). Finally, an employer's contacts with the forum may not serve to establish an employee's amenability to suit in the forum state. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984).

jurisdiction over OCF, their employer. *See* T. (11/1/91) at 9, App. 12.

C. Where the Trial Court Lacks the Authority to Compel an Individual to Appear as a Witness, It May Not Sanction the Individual's Employer for the Individual's Failure to Appear.

If, as *Salvator* and *Lee* establish, an Illinois court may not rely on an individual's status as employee to compel that individual to appear as a witness in an Illinois court, it follows that the individual's employer may not be sanctioned for the individual's failure to appear. An Illinois court may not attempt to compel indirectly what due process principles prohibit it from compelling directly, and it may not punish one person for the acts of another in asserting his or her constitutional rights.

. . . .

The constitutionally objectionable effect of Rule 237(b) on OCF is well illustrated by *Truax v. Raich*, 239 U.S. 33 (1915). There, Arizona passed a statute that purported to require any employer of more than five persons to employ at least eighty percent "qualified electors or native-born citizens of the United States," and specified certain punishments for any employer that violated the statute. *Id.* at 35. The Supreme Court expressly rejected the argument that the suit must fail because the statute operated only on the employer, not the aliens who had a right not to be discriminatorily denied employment, and had no difficulty in holding that the statute violated the fourteenth amendment. *Id.* at 37-43. So too here, Rule 237(b) cannot be defended on the ground that it is OCF, not Mr. Boeschenstein or Dr. Konzen, that the statute singles out for sanctions.

The trial court's reading of Rule 237(b) is implicitly grounded upon the employer's assumed ability to coerce its employee to appear, ultimately upon threat of termi-

nation; similarly, the threat of harm to the corporation is intended to coerce the director's attendance at trial. But OCF cannot compel its employees to surrender a constitutional right, and it cannot simply "produce" Dr. Konzen and Mr. Boeschenstein as though they were *chattel* rather than *persons*. In fact, if OCF were to discharge them for exercising their right not to subject themselves to the jurisdiction of Illinois courts, or otherwise subject them to "coercion" (as suggested by the trial court, T. (11/1/91) at 8, 10), it would be exposed to potential liability for a wrongful discharge. *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St. 3d 228, 551 N.E.2d 981 (1990) (tort action available under Ohio law for wrongful discharge).

By conceding that the Illinois court could not assert jurisdiction over or sanction Dr. Konzen and Mr. Boeschenstein, the trial court conceded the fatal flaw of Rule 237(b). Simply put, it is fundamentally unfair, and hence a violation of due process, for the State to subject OCF to sanctions for an individual's exercise of his or her constitutional rights.

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EXCERPTS FROM OCF'S REPLY BRIEF IN THE APPELLATE COURT OF ILLINOIS

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. . . [T]his case concerns whether an Illinois court—in the face of unquestioned principles of Illinois and federal due process—may reach through an employer that is subject to personal jurisdiction in Illinois and, by threatening that employer with sanctions as severe as a default judgment, force one of its officers, directors, or employees who is not subject to process in Illinois nonetheless physically to appear here as a witness at trial. Put simply, this case presents the question whether an Illinois court can achieve indirectly what due process principles forbid it to attempt directly. The answer is plainly no, and nothing plaintiff has said in her brief in response counsels otherwise.

ARGUMENT

I. In Light of Illinois and Federal Due Process, Rule 237(b) Cannot Be Read to Permit a Trial Court To Sanction a Party for the Failure of Its Officer, Director, or Employee Physically to Appear at Trial.

In its opening brief, OCF demonstrated that in light of well-entrenched principles of Illinois and federal due process, Rule 237(b) cannot be read to authorize an Illinois trial court to sanction a party for the failure of its officer, director, or employee to appear as a witness at trial in response to a notice served upon the party pursuant to that Rule, and that if it were so read it would be constitutionally invalid. . . .

. . . [Where] there is no *constitutional* authority to compel the individuals to appear, Rule 237(b) cannot be

read to evade that restriction by authorizing the court to compel their appearance by means of an order directed at their employer. In *Truax*, the Court cursorily dismissed the suggestion that the discriminatory statute at issue was somehow saved because it operated directly on the employer and not the aliens who, upon being fired, would ultimately feel its effect. 239 U.S. at 38-39. So too here, Rule 237(b) cannot be justified on the ground that OCF, not the individuals whose appearance it is designed to compel, is the party subject to punishment.

Plaintiff also attempts to rely on *Oakview New Lenox Sch. Dist. No. 122 v. Ford Motor Co.*, 61 Ill. App. 3d 194, 378 N.E.2d 544 (3d Dist. 1978). There, before holding that the plaintiff had not shown the "good cause" required by Rule 237(b), the court suggested that jurisdiction over the corporate party "includes the power to order [that] corporate party to produce its officers and directors at trial." *Id.* at 547. However, not only did the *Oakview* court not have the benefit of the [Illinois] Supreme Court's decision in [*Rollins v. Ellwood*, 141 Ill. 2d 244, 565 N.E.2d 1302 (1990)], it was not asked to consider, and did not decide, the issue presented here—specifically, whether in light of Illinois and federal due process principles, Rule 237(b) may be read to compel the appearance at trial of a non-party witness who could not be independently reached with process.

. . . .

The decisions in *Aldrich* and *McGill* demonstrate that a court may not expand upon its authority to compel a witness's attendance even on the basis of the witness's status as a *party* to the litigation, let alone, as *Central Grain* and *Lee* confirm, his or her status as an officer, director, or employee of a party. While these cases involved statutory restrictions on judicial authority, their reasoning applies with equal force to constitutional restrictions: just as Illinois and federal courts cannot disregard limitations on their authority imposed by govern-

ing rules on the basis of the proposed witness's status as a party or employee of a party, Illinois courts applying Rule 237(b) cannot use that status as a reason to disregard limitations on their authority imposed by the Illinois and federal due process clauses. . . .

Finally, contrary to plaintiff's supposition, it is irrelevant to the question presented here whether OCF has attempted to compel Mr. Boeschenstein or Dr. Konzen to appear or could successfully do so. OCF objects to the construction given Rule 237(b) by the trial court precisely because it objects to serving as the tool by which that court has overreached its constitutional authority. The question here is not whether OCF can be compelled to perform some act, such as the production of documents, that is within the power of the corporation itself, by whatever agent it designates, to perform. The question is whether an Illinois court may constitutionally use the threat of sanctions against an employer to allow a litigant to, in effect, compel a designated employee who is not personally subject to Illinois process physically to appear here as a witness at trial. . . .

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EXCERPTS FROM OCF'S PETITION FOR LEAVE TO APPEAL TO THE SUPREME COURT OF ILLINOIS

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STATEMENT OF FACTS

. . . . OCF argued that plaintiff could not demonstrate good cause sufficient to compel the appearance of Dr. Konzen and Mr. Boeschenstein, and that using Rule 237(b) to compel OCF to force the individuals to surrender their right not to submit to jurisdiction in Illinois would violate Illinois and federal due process guarantees. . . .

ARGUMENT

Contrary to fundamental principles of Illinois and federal due process, the Appellate Court erroneously interpreted Rule 237(b) to permit plaintiff to compel the appearance at trial of individual directors, officers, and employees of OCF even though Illinois cannot constitutionally assert personal jurisdiction over those individuals. . . .

I. THIS COURT SHOULD GRANT LEAVE TO APPEAL IN ORDER TO CORRECT THE APPELLATE COURT'S ERRONEOUS INTERPRETATION OF RULE 237(b).

A. The Appellate Court Erred In Holding That A Trial Court May Constitutionally Coerce The Appearance Of Individual Witnesses Over Whom It Lacks Personal Jurisdiction By Imposing Sanctions On Their Employer.

It is undisputed that under the fiduciary-shield doctrine, as adopted by this Court in *Rollins v. Ellwood*, 141 Ill. 2d 244, 565 N.E.2d 1302 (1990), as well as the due process guarantee of the fourteenth amendment to the United States Constitution, the Illinois courts cannot constitutionally exercise personal jurisdiction over Mr. Boeschenstein and Dr. Konzen. It is likewise undisputed that, as a result, the Circuit Court could not constitutionally impose contempt sanctions directly on those individuals for refusing to appear at trial. The Appellate Court, however, has interpreted Rule 237(b) in a manner that permits an Illinois trial court to bypass the constitutional limitations on its powers by conscripting OCF, as the individuals' employer, to coerce the individuals' appearance. . . .

2. An Illinois Court Cannot Evade the Requirements of Due Process by Attempting to Coerce an Individual to Appear by Threatening Sanctions Against the Individual's Employer.

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. . . . As this Court noted in *Rollins v. Ellwood*, 141 Ill. 2d 244, 565 N.E.2d 1302 (1990), an employee "has little or no alternative besides unemployment when ordered to enter another State to carry out the wishes of

his employer." *Id.* at 280, 565 N.E.2d at 1318. Indeed, the Appellate Court's reasoning ignores the very purpose of Rule 237(b) as it was interpreted by the Circuit and Appellate Courts in this case—to allow the trial court to use an employer's leverage over its employees to compel the attendance of persons Illinois could not otherwise reach. As the Circuit Court observed, while it did "not have the authority to compel [the two men] to come to the State of Illinois to testify," OCF could achieve that result by "economic coercion." (R. VIII 8; *see also id.* at 8-11 (OCF must either coerce its employees' attendance by threat of dismissal or suffer default)). But if the Circuit Court could force OCF to order Dr. Konzen and Mr. Boeschenstein to appear under threat of discharge from employment, then the Circuit Court would have succeeded in coercing them to appear just as effectively as if it had threatened them with sanctions directly.[6]

Due process principles cannot be so easily evaded. . . . [I]t is well established that a state may not avoid constitutional limitations on its powers merely by having a private party act on its behalf: state action remains state action even when it is performed by a private party acting under the state's direction. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170-71 (1970); *Truax v. Raich*, 239 U.S. 33, 38-39 (1915); *see Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

In *Truax*, the United States Supreme Court unambiguously recognized that state coercion of an employer can operate as state action against its employees. There,

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[6] The question presented by the Appellate Court's construction of Rule 237(b) is *not* whether OCF can be compelled to perform some act, such as the production of documents, that is within the power of the corporation itself, by whatever agent it designates, to perform. The question is whether an Illinois court may constitutionally use the threat of sanctions against an employer to allow a litigant to, in effect, compel a designated employee who is not personally subject to Illinois process physically to appear here as a witness at trial.

the Court upheld an injunction against the criminal prosecution of an employer for exceeding a state-imposed quota limiting the number of his noncitizen employees. Although the employer had the absolute right to discharge the employees at will under state law,[7] the Court recognized that any such discharge would be a result of the requirement imposed by the state. 239 U.S. at 38-39. Therefore, the Court held that the statute directly violated the constitutional rights of the noncitizen employees who could potentially lose their employment as a result of the state's enforcement action against their employer. *Id.*; *see also Adickes*, 398 U.S. at 170-71 (employment discrimination under state compulsion is state action).

This rule is equally clear from *Sniadach*. There, the clerk of a Wisconsin state court had issued a prejudgment garnishment order directing the defendant's employer to hold a portion of the defendant's wages. The United States Supreme Court found that the garnishment procedures used in the state court violated the defendant's due process rights, even though a private party (the employer), and not an officer of the state, had seized the defendant's assets. Although the process of the court was directed to the employer, who alone would have been subject to sanctions for disobeying the court's order, it is clear that he was acting on behalf of the state

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[7] OCF does not have an absolute right to discharge its employees, but could potentially be subject to liability for wrongful discharge under Ohio law. *Greeley v. Miami Valley Maintenance Contractors*, 551 N.E.2d 981 (Ohio 1990) (tort action for wrongful discharge available under Ohio law). Moreover, if such a wrongful discharge were committed in concert with the State of Illinois and in violation of the requirements of federal or Illinois due process, OCF could also potentially be liable under 42 U.S.C. § 1983 or Illinois law. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (corporation acting in concert with state is liable under § 1983 for violation of due process clause).

in seizing the property of the employee, who was the ultimate target of the state's action. 395 U.S. at 338-39.[8]

Where, as here, a private party acts under compulsion from the state, the actions of that party are attributable to the state for due process and equal protection purposes. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937-39 (1982); *Adickes*, 398 U.S. at 170-71; *Truax*, 239 U.S. at 38-39. Thus, the Appellate Court in this case patently erred in suggesting that Rule 237(b) caused no due process problems because "[u]ltimately" it was the corporation, not Illinois, that "forces its employees to submit to the jurisdiction of Illinois." AppendixA at 14. Simply put, a state cannot do indirectly what due process prohibits it from doing directly.

3. Rule 237(b) May Easily Be Construed to Comport With the Due Process Requirements of the Illinois and United States Constitutions.

Whenever possible, a statute or rule should be interpreted to avoid constitutional defects. *People ex rel. Moss v. Pate*, 30 Ill. 2d 271, 274, 195 N.E.2d 641, 643 (1964); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Here, there is nothing in either the text of Rule 237(b) or the accompanying Committee Comments to suggest that in promulgating the Rule, this Court intended to ignore Illinois and federal due process principles by authorizing Illinois trial courts to compel attendance of persons beyond their personal jurisdiction. To the contrary, it

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[8] Similarly, in *North Georgia Finishing Co. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), a Georgia state court had issued a prejudgment writ of garnishment directing a bank to freeze the defendant corporation's funds in the bank's possession. Again, the United States Supreme Court struck down the state procedure on due process grounds, even though the funds were seized by a private party, the bank, acting under court order.

appears that Rule 237(b) was intended merely to allow a party, in the interests of convenience, to substitute a notice for the personal service of a trial subpoena in certain cases. *See Hawkins v. Wiggins*, 92 Ill. App. 3d 278, 285, 415 N.E.2d 1179, 1184 (1980). It need hardly be said that one party's due process rights may not be overridden for the mere convenience of another party. There is simply no reason to suppose that Rule 237(b), which provides for the service of notice on parties and their employees, officers and directors, allows the court to compel the attendance of witnesses who are outside its personal jurisdiction any more than does Rule 237(a), which provides for the service of trial subpoenas on nonparty witnesses. But so construed, as by the Appellate Court here, Rule 237(b) violates Illinois and federal due process guarantees.

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